

TPB Information Sheet

TPB(I) 36/2021

Supervisory arrangements under the *Tax Agent Services Act 2009*

DISCLAIMER

This is a Tax Practitioners Board (TPB) information sheet (TPB(I)). It is intended to be for 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 and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law.

Document history

This information sheet was originally issued as an Exposure Draft on 31 May 2021. The TPB invited comments and submissions in relation to the information contained in it by 28 June 2021. The TPB considered all the comments and submissions received and now publishes the following TPB(I).

On 1 January 2022, the TPB updated this TPB(I) to include information to assist tax agents with a tax (financial) advice services condition.

This information sheet is based on the TASA as at 17 February 2021 (latest version available at the time of publication).

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Supervisory arrangements under the *Tax Agent Services Act 2009*

Introduction

1. This TPB information sheet (TPB(I)) has been prepared by the TPB 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 or BAS services¹ to a competent standard, and to carry out supervisory arrangements.
3. In addition, all registered tax agents and BAS agents (collectively referred to as 'tax practitioners') must ensure that tax agent or BAS services provided on their behalf are provided competently. This includes ensuring that there are a sufficient number of registered individuals within the practice to carry out supervisory arrangements.

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
 - 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.
6. 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 or BAS services competently.²

¹ Tax agent services include tax (financial) advice services.

² Paragraph 2.56 of the Explanatory Memorandum to the Tax Agent Services Bill 2008.

7. Further, the sufficient number requirement is an ongoing registration requirement. Section 30-35 of the TASA provides that a partnership or company tax practitioner must notify the TPB in writing whenever it ceases to meet one of the tax practitioner registration requirements³ or any other circumstances relevant to registration⁴ changes. The partnership or company tax practitioner must notify of this change within 30 days of the day on which it becomes aware, or ought to have become, aware that the event occurred.⁵
8. Whether a partnership or company tax practitioner has a sufficient number of registered individuals to provide tax agent or BAS 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.

Supervisory arrangements

9. Supervisory arrangements are also directly relevant in the context of:
 - the Code of Professional Conduct which requires all registered tax practitioners to ensure that the services provided on their behalf are provided competently⁶
 - an individual obtaining relevant experience in order to be registered (Schedule 2 of the Tax Agent Services Regulations 2009 (TASR) provides that relevant experience for the purposes of registration can include work under the supervision and control of a registered tax practitioner)
 - the civil penalty provisions in section 50-30 of the TASA⁷ (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).

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

⁴ Paragraphs 30-35(2)(d) and 30-35(3)(d) of the TASA.

⁵ Subsection 30-35(4) of the TASA.

⁶ The Accounting Professional and Ethical Standards Board (APESB) standard APES 110 Code of Ethics for Professional Accountants (APES 110) also applies to registered tax practitioners who are members of one of the joint accounting bodies. R113.2 requires members to take reasonable care to ensure that those working in a professional capacity under the member's authority have appropriate training and supervision. In addition, paragraph 3.13 of APES 220 Taxation Services requires members to be competent when providing a tax service. See www.apesb.org.au.

⁷ 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.

10. 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; andb. 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; andc. 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; andb. 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; andc. 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.
<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; andb. 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; andc. 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)...(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.

11. 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:

212 ... *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 Part VIIA of the *Income Tax Assessment Act 1936* as in force immediately before 1 March 2010; or
- (e)...

For a tax agent with a tax (financial) advice services condition registration:

212 ... *relevant tax (financial) advice experience* means work by an individual:

- (a)...
- (c) under the supervision and control of a registered tax (financial) adviser within the meaning of the Act as in force immediately before 1 January 2022; 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* as in force immediately before 1 March 2010; or
- (e)...
- (f) under the supervision and control of a qualified tax relevant provider, or
- (g)...

Sufficient number requirement

Who can form the sufficient number?

12. 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.⁸
13. Similarly, the number of registered individual tax agent(s) that a partnership or company tax agent with a tax (financial) advice services condition 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 12 above, may also include the financial services licensee's representatives⁹, including authorised representatives of the licensee, responsible managers, compliance officers and regional/line managers.
14. 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 29 below.

Determining the sufficient number

15. There is no set formula for determining the sufficient number of registered individual tax practitioners a partnership or company is required to have to satisfy this requirement. However, the minimum number of registered individuals forming the sufficient number must be at least one.
16. In determining the adequacy of the nominated sufficient number, the TPB will take into account a number of factors, including:
 - a. having available adequate resources (including financial, technological and human resources) to provide the tax agent or BAS services and to carry out supervisory arrangements
 - b. maintaining the competence to provide those tax agent or BAS services
 - c. ensuring that the registered individual tax practitioner responsible for the supervision and control is fit for purpose, that is, the registered individual is adequately trained and competent, to provide the supervision and control
 - d. ensuring that the registered individual tax practitioner responsible for the supervision and control only supervises tax agent or BAS services they are registered to provide
 - e. size and scale of the tax agent or BAS services provided within the business (for example, turnover, number of clients and number of relevant staff)

⁸ See paragraph 2.56 of the Explanatory Memorandum to the Tax Agent Services Bill 2008.

⁹ 'Representatives' has the meaning given by paragraph (a) of the definition of that expression in section 910A of the *Corporations Act 2001*.

- f. the type and complexity of tax agent or BAS services being provided and supervised
 - g. number of qualified and experienced staff
 - h. the number of qualified tax relevant providers¹⁰ responsible for overseeing the supervisory arrangements
 - i. the frequency of appropriate training and development activities for all relevant staff
 - j. the level, type and complexity of technology or software used, including network security protocols in place and digital monitoring and review processes
 - k. risk management processes and procedures, including the use of delegated supervision processes
 - l. the supervisory arrangements (for example, quality assurance and control practices and escalation procedures) in place
 - m. any conditions imposed by the TPB on the entity's registration based on the qualifications and experience of its staff.¹¹
17. In assessing the capacity of the individual tax practitioner assuming the role of supervising tax practitioner 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 16 above.
18. 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 individual registered 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, and provided 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 tax practitioner and understands the responsibilities that attach to that role.
19. 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.

¹⁰ Subsection 90-1(1) of the TASA states that qualified tax relevant provide has the same meaning as in Part 7.6 of the Corporations Act. See section 910A of the *Corporations Act 2001*.

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

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. Also, there is no existing documentation in place that would remove the need for Tom's prior written informed consent.

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.

20. The TPB is of the view that it is ultimately a matter for all registered tax and BAS agents to assess how many registered individual tax practitioners their business requires to ensure that tax agent or BAS 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 agents with a tax (financial) advice services condition

21. 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 license
- 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 license of a larger licensee

22. The TPB provides the following additional guidance for AFS licensees:

- a. From 1 January 2022 to 31 December 2022, there is a transitional arrangement in place which allows AFS licensees that were registered as a tax (financial) adviser immediately before 1 January 2022 to continue to provide tax (financial) advice services, without being subject to a civil penalty.

From 1 January 2023, where an AFS licensee registers as a tax agent, it must have at least one registered tax agent as its sufficient number. In determining the number of registered tax agents required to satisfy the sufficient number requirement, the TPB may take into account the number of qualified tax relevant providers within the company who provide tax (financial) advice services.

Where an AFS licensee does not register as a tax agent, it must ensure that every entity that provides tax (financial) advice services on its behalf are either registered as a tax agent with the TPB or a qualified tax relevant provider with the Australian Securities and Investments Commission in order to continue providing tax (financial) advice services on behalf of the AFS licensee for a fee or reward.

Example 2

ABC Pty Ltd is a financial services that was registered as a tax (financial) adviser before 1 January 2022. ABC Pty Ltd may continue to provide tax (financial) advice services from 1 January 2022 and has until 1 January 2023 to either:

- be registered as a tax agent – to be registered the company must comply with the eligibility requirements in subsection 20-5(3) of the TASA; **or**
- ensure that all of its employees/representatives who provide tax (financial) advice services on its behalf are registered tax agents or qualified tax relevant providers.

If ABC Pty Ltd registers as a tax agent, to satisfy the eligibility requirements in subsection 20-5(3) of the TASA, ABC Pty Ltd will need to ensure that it has at least one registered tax agent. In determining the number of registered tax agents required to satisfy the sufficient number requirement, ABC Pty Ltd may take into account the number of qualified tax relevant providers who provide tax (financial) advice services on behalf of the licensee.

- b. AFS licensee that applies to register as a tax agent on or after 1 January 2022

Where an AFS licensee applies to register as a tax agent on or after 1 January 2022, and was not previously registered as a tax (financial) adviser before 1 January 2022, it must have at least one registered tax agent as its sufficient number. In determining the number of registered tax agents required to satisfy the sufficient number requirement, the TPB may take into account the number of qualified tax relevant providers within the company who provide tax (financial) advice services.

Example 3

XYZ Pty Ltd is a financial services licensee that applies to be registered as a tax agent on 1 June 2022.

To be eligible to be registered as a tax agent, XYZ Pty Ltd must have a sufficient number of individuals (such as employees and directors) who are able to provide tax agent services (which includes tax (financial) advice services) to a competent standard and to carry out supervisory arrangements. To meet this requirement, XYZ Pty Ltd must have at least one representative (employee or director) who is a registered tax agent. However, in determining whether XYZ Pty Ltd meets the sufficient number test, the TPB may also take into account the number of qualified tax relevant providers within the company who provide tax (financial) advice services.

Until it is registered, XYZ Pty Ltd must ensure that all of its employees/representatives who provide tax (financial) advice services on its behalf are registered tax agents or qualified tax relevant providers.

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

Meaning of 'competent standard' and 'supervisory arrangements'

24. 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 or BAS services performed on behalf of a registered tax practitioner to ensure those services are provided competently.

'Competent standard'

25. The Macquarie Dictionary¹² provides the following definition:

Competent

Properly qualified; capable

Fitting, suitable or sufficient for the purpose; adequate.

¹² The Macquarie Dictionary, [Multimedia], version 5.0.0.

26. 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, subsections 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 or BAS services they provide, or are provided on their behalf, are provided competently
 - maintain knowledge and skills relevant to the tax agent or BAS services they provide
 - take reasonable care to ascertain clients' state of affairs
 - take reasonable care to ensure the taxation laws are applied correctly.¹³
27. Competence, with respect to tax agents or BAS agents, can therefore be defined as a state of being capable, fitting, suitable or sufficient to provide a tax agent or BAS service.
28. 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 or BAS 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 or BAS services competently¹⁴.

'Supervisory arrangements' and 'supervision and control'

29. The Macquarie Dictionary¹⁵ 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.

¹³ For registered tax practitioners who are members of one of the joint accounting bodies, consideration should be also be given APES 110, which considers factors in determining the level of supervision required. In addition, paragraph 3.13 of APES 220 requires members to be competent when providing a tax service. See www.apesb.org.au.

¹⁴ Paragraph 2.56 of the Explanatory Memorandum to the Tax Agent Services Bill 2008.

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

30. 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.¹⁶

Adequate supervisory arrangements

31. 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.
32. 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.
33. 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 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.
34. 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 changed over time with an increasing prevalence for workplaces to operate in a remote or digital setting, the principles drawn from the AAT cases continue to remain relevant.
35. Some key examples of these cases are provided in the [Appendix – Case examples](#).

¹⁶ APESB standard APES 320 Quality Control for Firms (APES 320) also applies to registered tax practitioners who are members of one of the joint accounting bodies. Paragraph 61 of APES 320 considers the elements of engagement supervision, including the tracking of progress, and considering of the competence and capabilities of individual members of the engagement. See www.apesb.org.au.

36. The following considerations may be relevant in determining whether adequate supervision and control has been, or is being, exercised¹⁷:

- the level and depth of oversight undertaken over the provision of tax agent or BAS services,¹⁸ which will vary according to the skills and experience of the staff and the complexity of the services being provided, noting that a substantial degree of oversight may be necessary¹⁹, for example, when supervising a terminated tax practitioner
- 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 control²⁴.

¹⁷ For registered tax practitioners who are members of one of the joint accounting bodies, consideration should be also be given to paragraphs 39 and 57 of APES 320, which consider factors relating to competence, capabilities and resources, in addition to factors in determining the level of supervision required. See www.apesb.org.au.

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.

37. The following considerations may also be relevant to ensure that adequate supervision and control is undertaken by a registered tax practitioner:

- taking reasonable steps to ensure the accuracy of a document for which a declaration or statement is 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 quality review of work undertaken by staff as required
- implementing 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.

38. 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 or BAS 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 36 and 37 above.

39. 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.

40. However, a supervisory plan alone may not necessarily demonstrate that there is adequate supervision and control in place. Whether the supervisory plan is adequate will be assessed on a case-by-case basis, taking into account all of the facts and circumstances, including the steps taken to ensure compliance with the plan.

Remote supervisory arrangements

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

42. 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

43. Remote supervisory arrangements refer to arrangements where supervision and control is exercised from a different location, including in relation to outsourcing and offshoring arrangements.²⁶ It may also refer to remote supervisory arrangements where the supervisor and the supervised entity are employed by different entities.

44. 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.

45. In addition to the factors outlined in paragraphs 36 and 37 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

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

²⁶ For more information about adequate supervisory arrangements where tax agent or BAS services have been outsourced or offshored, see TPB Practice Note [TPB\(PN\) 2/2018 Outsourcing and offshoring of tax services – Code of Professional Conduct considerations](#).

- other administrative obstacles inherent with a remote supervisory arrangement.²⁷
46. A determination of whether the supervision is adequate will be a question of fact having regard to the particular circumstances of the arrangement.
47. As noted at paragraphs 38 and 39 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 36 and 37 above, where remote supervisory arrangements are in place, the supervisory plan should also cover the considerations outlined in paragraph 45 above.
48. 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

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

²⁷ 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.

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 provided Amanda with a suite of training material but has not undertaken any training or mentoring of Amanda himself
- > 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

50. The TPB acknowledges that a registered tax practitioner carrying out supervisory arrangements may be doing so for multiple related or unrelated entities, or both.
51. 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 36 and 37 above. Where the supervisory arrangements involve unrelated entities, due consideration must also be given to the factors outlined in paragraph 45 above.
52. 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 or BAS 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

53. 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:

- a) two are recent graduates with less than 6 months experience
- b) one staff member has five years' experience in providing BAS services
- c) the remaining staff members have two years' experience.

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 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

54. 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.

55. 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 or BAS services they provide, or are provided on their behalf, are provided competently
 - maintain knowledge and skills relevant to the tax agent or BAS services they provide
 - take reasonable care to ascertain clients' state of affairs
 - take reasonable care to ensure the taxation laws are applied correctly.
56. Of most relevance in the context of supervisory arrangements is Code Item 7 which provides that you must ensure that the tax agent or BAS service provided on your behalf is provided competently.
57. 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.
58. 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 or BAS services.
59. 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 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. 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.