



Law Council
OF AUSTRALIA

Enhancing the Tax Practitioners Board's sanctions regime and extending the Code of Professional Conduct

The Treasury

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council gratefully acknowledges the Taxation Committee of the Business Law Section for its contribution to this submission.

Context

The Law Council of Australia is aware of the views expressed in the joint Submission by professional bodies in their response to the Consultation paper ‘Enhancing the Tax Practitioners Board’s sanctions regime’ (the **Consultation paper**), released on 10 December 2023, and is grateful to those professional bodies for sharing these views.

The Exposure Draft *Tax Agent Services (Code of Professional Conduct) Determination 2023* proposes to elaborate or supplement the existing Code of Professional Conduct in Division 30 of the *Tax Agent Services Act 2009*.

This submission has been prepared from the particular perspective of the Australian legal profession and the approaches to professional disciplinary matters in legal profession regulation. In doing so, it is necessary to also comment on the proposed additions to the Code of Professional Conduct in Division 30 of the *Tax Agent Services Act* contained in the Exposure Draft of the *Tax Agent Services (Code of Professional Conduct) Determination 2023*.

Tax agent services and BAS agent services (**tax practitioner services**) provided by legal practitioners as a legal service are generally not subject to regulation under the *Tax Agent Services Act*.

Part 5 of the *Tax Agent Services Act* contains prohibitions on providing or advertising tax practitioner services by an individual or body corporate who is not a *registered tax agent*. Sections 50-5 and 50-10 of the *Tax Agent Services Act* exclude from these prohibitions, tax practitioner services that are provided as a legal service under the authority of a state or territory law regulating legal practice and the provision of legal services. However, the exclusion does not apply to preparation of returns or return-like statements such as income tax returns, BAS returns, PAYG withholding statements and the like, except where they are prepared as a legal service in the course of acting for a trust or deceased estate as a trustee or personal legal representative.

The policy reason for excluding tax practitioner services provided as a legal service from the prohibitions in the *Tax Agent Services Act* is to avoid dual regulation of a service (and hence the service provider) as both a legal service (under authority of State and Territory laws) and as a tax agent service (under Commonwealth laws).

The Law Council acknowledges that avoiding dual regulation is a policy decision of the Commonwealth. It is not a matter of the Commonwealth lacking legislative power over taxation matters. It is important therefore that Commonwealth proposals to strengthen the tax agents sanctions regime and supplement the Code of Professional Conduct have equivalence in State and Territory laws that regulate legal practitioners and the provision of legal services.

Further, to the extent that a small proportion of legal practitioners are also registered tax practitioners, because they provide tax agent and BAS agent services not excluded from the *Tax Agent Services Act*, dual regulation remains an area of focus for the Law Council.

The Law Council has a wider public interest, beyond the legal profession per se, in advocating for laws that are fair, reasonable and an appropriate and proportionate response to the matters being dealt with. Matters relating to professional conduct and regulatory responses to breaches of professional obligations are a significant issue for all professions, including those regulated by the *Tax Agent Services Act*.

Issues

The Law Council notes that the object of the Tax Agent Services Act “is to ensure that tax agent services are provided to the public in accordance with the appropriate standards of professional and ethical conduct”, and that this is to be achieved through a national registration system, a Code of Professional Conduct, and sanctions to discipline registered tax agents and BAS agents.¹

At the time the Bill for the Tax Agent Services Act was introduced, the then Assistant Treasurer drew a distinction between “administrative sanctions” for non-compliance with the Code, and a specific civil penalties regime for certain specified misconduct by registered agents and unregistered entities.²

The Law Council considers that the proposal to introduce civil penalties for a breach of the Code conflates two separate issues in professional regulation—one being penalisation of a professional as an offender in response to a contravention of the law that has occurred, and the other being protection of the public, through appropriate professional discipline, from future breaches of standards of professional conduct, either by the professional involved or by other professionals.

The Law Council accordingly agrees with the view of other professional bodies that a civil penalty is an inappropriate response to a breach of a standard of professional conduct.

Further, the Law Council considers it inappropriate to include specific legal obligations in codes (or rules) of professional conduct, and that a distinction should be made between an offence that carries a civil or criminal penalty, and an assessment and disciplinary response to the underlying conduct, against accepted standards of professional conduct, that led to the contravention.

Division 30 as presently enacted shares some commonalities with professional conduct and disciplinary matters found in legal profession regulation. The Code includes standards of professional conduct similar to those found in, for example, the Australian Solicitors’ Conduct Rules (e.g. Item 7—to ensure that tax agent services are provided competently) and protective and preventative disciplinary sanctions for a breach of that standard (e.g. an order under paragraph 30-20(1)(a) to complete a specified course of education or training).

However, Division 30 also includes as professional conduct standards, obligations that are more appropriately stated as statutory prescriptions. Item 13 of the Code, for example, includes a professional conduct obligation to maintain professional indemnity insurance that meets the Board’s requirements. By contrast, the approach taken under legal profession regulation treats maintaining professional indemnity insurance as a statutory obligation³ separate from the professional conduct obligation to comply with the law.

The present design of Division 30 carries a degree of uncertainty about whether the Division is actually about professional conduct and discipline, or whether it is simply a scheme of statutory rules. The proposals to introduce civil penalties and an infringement notice regime using the ‘balance of probabilities’ standard for a breach of a professional conduct rule suggests the intention is the latter.

¹ Section 2-5

² Hansard, House of Representatives, 13 November 2008 [10844-10845]

³ Holding professional indemnity insurance is a prerequisite to a practising certificate being granted, and engaging in legal practice without holding or being covered by an approved professional indemnity insurance policy is punishable by a civil penalty. Legal Profession Uniform Law, sections 45(1) and 211.

The Law Council, in a submission dated 31 January 2020 responding to the Australian Law Reform Commission *Discussion Paper on Corporate Criminal Responsibility*, said:

[The] use of civil penalty notices (CPNs), which are akin to infringement notices, should, as stated in the proposal, be strictly limited to instances where the contravention is prima facie evident without court proceedings. The Law Council considers CPNs should only be available for relatively minor offences that could be categorised as strict liability or absolute liability offences and do not require the exercise of judgment as to the commission of the offence or assessment of the factual circumstances constituting the gravity of the offence. In this regard, the Law Council agrees with the Discussion Paper that CPNs should only be for a ‘confined subset of contraventions and not be available for any contravention that requires an evaluative judgment’. The use of CPNs, like infringement notices, could be useful where a high volume of contraventions occur and it is easy to assess the guilt or innocence of the offender.⁴

The Law Council maintains this view in relation to the proposal to introduce civil penalties under an infringement notice regime for breaches of the tax practitioners Code of Professional Conduct.

Approaching professional rules as if they were legislative rules carries the risk of “legalising” ethical rules, shifting the focus of attention to interpreting the words, looking for specific exemptions or permissions, rather than focusing on whether a particular course of action would or would not be unprofessional because it offends the principle underlying the rule—leading to an ‘abdication of professional judgment’ and a ‘spiritless compliance’ with ever more prescriptive rules.⁵

It has long been recognised that the primary purpose of disciplinary proceedings is not to punish, but to determine whether, because of the underlying conduct the practitioner engaged in, it is necessary in an appropriate way to protect the public from a person who has failed to meet the standard of competence and diligence expected of a legal practitioner, or to remove a person who is no longer a fit and proper person to practise law.⁶

Attachment A to this submission is an overview of the complaints and discipline scheme contained in Chapter 5 of the Legal Profession Uniform Law. It is to be noted that, to the extent that a pecuniary sanction is considered appropriate in a disciplinary matter, an order requiring payment of a fine of a specified amount is the approach taken. However, legal profession law does not elevate a *breach* of a professional conduct rule to the level of a *contravention* of a law, attracting *liability* for a civil penalty as a disciplinary sanction.

The Law Council has also reviewed the existing Code of Profession Conduct in Division 30 of the Tax Agent Services Act, and the proposed supplements to the Code set out in the *Exposure Draft Tax Agent Services (Code of Professional Conduct) Determination 2023* and has concluded that the proposals have equivalents in legal profession law (see **Attachment B**). It is to be noted, however, that some of the current and proposed items in the Tax Agents Code of Conduct are treated as rules of professional conduct in the Australian Solicitors Conduct Rules, and some are provided for as statutory obligations in the Legal Profession Uniform Law.

⁴ <https://lawcouncil.au/publicassets/82dafd7b-2646-ea11-9403-005056be13b5/3740%20-%20ALRC%20Corporate%20Criminal%20Responsibility%20Discussion%20Paper.pdf> [33]

⁵ Law Council of Australia *Review of the Australian Solicitors’ Conduct Rules*: February 2018 [28 – references omitted] at <https://lawcouncil.au/files/web-pdf/2018%20Feb%20%2001%20ASCR%20Consultation%20Discussion%20Paper.pdf>

⁶ See for example *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46 and *Smith v NSW Bar Association* [1992] HCA 36

The Law Council is concerned that the inclusion of statutory obligations in the Code of Professional Conduct in Division 30, in combination with a civil penalty for a breach of the Code may result in a tax practitioner being subject to multiple penalties for the same conduct.

By way of example, item 4 in the present Code states: “You must act lawfully in the best interests of your client”. Thus, it would appear that, if a tax practitioner has acted “unlawfully” by making a false and misleading statement to the Commissioner and is punished by way of a civil or criminal penalty under the *Taxation Administration Act 1953* for making such a statement, the tax practitioner may also be liable for a civil penalty under the Tax Agent Services Act for a breach of the Code of Professional Conduct.

A similar concern arises about proposed Determination Item 15 in the *Exposure Draft Tax Agent Services (Code of Professional Conduct) Determination 2023* which provides that a tax practitioner must not make a statement to the Board or the Commissioner that the practitioner knew, or ought reasonably to have known, is false, incorrect or misleading in a material particular, or omit any matter or thing without which the statement is misleading in a material respect, in his or her capacity as a registered tax agent or BAS agent or in any other capacity.

Recommendations

The Law Council recommends further analysis and consideration be given to the proposed amendments to Division 30 of the *Tax Agent Services Act 2009* and to the Code of Professional Conduct, so that:

1. Civil penalties are confined to contraventions of specific legal obligations and are set out elsewhere in the Tax Agent Services Act or in other legislation.
2. The Code of Professional Conduct focusses exclusively on standards of professional conduct by excluding specific legal obligations.
3. The sanctions contained in Division 30 of the Tax Agent Services Act remain focused on disciplinary measures to protect the public from future breaches of the standards of professional conduct by tax professionals.

Attachment A

LEGAL PROFESSION UNIFORM LAW APPROACH TO DISPUTE RESOLUTION AND PROFESSIONAL DISCIPLINE

The scheme of Chapter 5 of the Legal Profession Uniform Law is as follows:

Complaints

The Chapter is enlivened by the making of a *complaint* that relates to any dispute or issue about any conduct to which the Chapter applies. A complaint may be about a *consumer matter* or a *disciplinary matter*, or a combination of both kinds of matters. Any person or body may make a complaint. The designated regulatory authority for Chapter 5 may also initiate a complaint, but only in relation to a disciplinary matter (sections 265–268).

Consumer matters are matters that relate to the provision of legal services by a legal practitioner or law practice (including a dispute about legal costs), whereas a *disciplinary matter* is a complaint about the conduct of a legal practitioner or law practice that would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct (sections 269 and 270).

The designated regulatory authority is required to undertake a preliminary assessment of a complaint and may decide, after that assessment, to close the whole, or part of the complaint on one or more specified grounds (section 277).

If the complaint is not closed after a preliminary assessment, the designated regulatory authority undertakes an investigation, and may extend the scope of the investigation so as to include other conduct revealed during the investigation (sections 282–283).

The respondent to the complaint is (subject to particular exceptions) to be notified and provided with the details or a summary of the complaint, and to be given the opportunity to lodge a submission in response (sections 279–281).

The actions a designated regulatory authority may take towards resolving a complaint differ as between a consumer matter complaint and a disciplinary matter complaint.

Consumer matters

Before resolving a *consumer matter* complaint the designated regulatory authority has to be satisfied that at least one of the parties has made a reasonable attempt to resolve the matter, but that attempt has failed, or that it would be unreasonable to the complainant to be involved in such an attempt (section 266). The designated regulatory authority is then required to attempt to resolve the complaint by informal means, or by mediation and if this succeeds a settlement agreement is concluded. A settlement agreement can be filed with a court, and if this is done, the agreement is taken to be an enforceable order of the court (sections 286–289)

Resolving a consumer matter

Absent the above resolution mechanisms succeeding, the designated regulatory authority can proceed to resolve a consumer matter (other than a costs dispute) by making a determination that is fair and reasonable in the circumstances. The kinds of orders that can be made by the designated regulatory authority in determining a consumer matter are a caution; an order requiring an apology; requiring the respondent to redo the work at no cost or to waive or reduce the fee; or to undertake training, education, counselling or be

supervised. In addition, the designated regulatory authority may make a compensation order against the client (section 290).

In the relation to a consumer matter complaint about legal costs, the designated regulatory authority can make a binding determination of what is fair and reasonable if the amount of costs still in dispute is below a specified threshold. If the amount of costs still in dispute is greater than the specified threshold, the designated regulatory authority cannot determine the matter and must inform the parties of the right to apply to the court for a costs assessment (sections 291–293).

Disciplinary matters

Core issue

The core issue in resolving a disciplinary matter is whether the conduct of the lawyer amounts to *unsatisfactory professional conduct* or *professional misconduct*.

The concept of *unsatisfactory professional conduct* is defined as *including* conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (section 296).

The concept of *professional misconduct* is defined in section 297 as including:

- (a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

(It is useful to note that part (b) of the concept of *professional misconduct* reflects the common law and ASCR Rule 5—Dishonest or disreputable conduct).

What constitutes unsatisfactory professional conduct or professional misconduct?

The Uniform Law does not conclusively declare any particular matters (including a contravention of the Uniform Law) to be *unsatisfactory professional conduct* or *professional misconduct*. Instead, section 298 of the Uniform Law specifies (without limitation) certain kinds of conduct that are *capable of* constituting *unsatisfactory professional conduct* or *professional misconduct* including for example:

- conduct consisting of a contravention of the Uniform Law, whether or not the contravention is an offence or punishable by way of a pecuniary penalty order; or whether or not the person has been convicted of an offence in relation to the contravention; or whether or not a pecuniary penalty order has been imposed for the contravention.
- conduct consisting of a contravention of the Uniform Rules (which includes the Australian Solicitors' Conduct Rules).
- conduct in respect of which there is a conviction for a serious offence, a tax offence or an offence involving dishonesty.
- conduct as or in becoming insolvent under administration.
- conduct in becoming disqualified from managing or being involved in the management of any corporation under the *Corporations Act 2001*.

- conduct consisting of a failure to comply with the requirements of a notice under the Uniform Law or the Uniform Rules.
- conduct in failing to comply with an order of the designated tribunal made under the Uniform Law [of the jurisdiction] or an order of a corresponding authority [of another jurisdiction] made under a corresponding law [of another jurisdiction].

Resolving a disciplinary matter

As with a consumer matter complaint, the designated regulatory authority is required to undertake a preliminary assessment of the complaint and may close the whole or part of the complaint following that assessment. Also, the respondent to the complaint is (subject to particular exceptions) to be notified and provided with the details or a summary of the complaint, and to be given the opportunity to lodge a submission in response. However, unlike a consumer matter complaint, there is no requirement for the parties to have first attempted to resolve the complaint themselves, or for the designated regulatory authority to attempt to resolve the complaint informally or through mediation.

The designated regulatory authority may make a finding of *unsatisfactory professional conduct* and having done so, may proceed to determine the disciplinary matter by making one or more of a specified set of orders (section 299(1)). Those orders can include, among other things, a caution, reprimand or apology; an order to redo the work at no cost or to waive or reduce the fee; an order to undertake training, education, counselling or be supervised; an order requiring payment of a fine of a specified amount; and an order recommending the imposition of conditions on a practising certificate.

Alternatively, the designated regulatory authority may initiate and prosecute proceedings in the designated tribunal⁷ if it considers it appropriate that alleged conduct that may amount to unsatisfactory professional conduct should be dealt with by a tribunal. All matters involving alleged conduct that may amount to professional misconduct are dealt with by the designated tribunal. (section 300)

If, following a hearing, the designated tribunal finds the lawyer guilty of unsatisfactory professional conduct or professional misconduct, the designated tribunal may make any orders that it thinks fit (section 302(1)). These can include any of the orders a designated regulatory authority can make, and any one or more other orders including for example: that the lawyer does, or refrains from doing something in connection with the practice of law; that the lawyer's practice be managed for a specified period in a specified way or subject to conditions; an order recommending the removal of the lawyer from a Supreme Court roll; that conditions be imposed on a practising certificate or that a practising certificate be suspended for a specified period or cancelled; an order that a practising certificate is not to be granted, or an application for a practising certificate is not to be made for a specific period. As with a designated regulatory authority, a designated tribunal may also make a compensation order and, following a finding of professional misconduct, impose a fine for a specified amount greater than a designated regulatory authority may impose for unsatisfactory professional conduct.

Procedural fairness, safeguards, reviews and appeals

Rules of procedural fairness

With one exception, section 319 provides that the rules of procedural fairness (to the extent they are not inconsistent with the Uniform Law or Uniform Rules) apply to a designated regulatory authority in relation to any investigation or determination of complaints; to the

⁷ Depending on the particular jurisdiction this may be a Civil and Administrative Tribunal or the Supreme Court.

making of other decisions in respect of complaints; and to the procedures of the designated regulatory authority in respect of complaints and any associated matters. The exception to this requirement relates to a decision that the whole or part of a complaint should be dealt with as a consumer complaint.

Designated regulatory authority

Section 299(2) provides that if a designated regulatory authority proposes to determine a disciplinary matter involving unsatisfactory professional conduct, the designated regulatory authority must provide the respondent and complainant with details of the proposed determination and invite them to make written submissions within a specified period. The designated regulatory authority must take in consideration submissions lodged within the specified period and may take into consideration submissions lodged after the specified period. This process is not required to be repeated if the designated regulatory authority decides to make a determination in different terms after considering submissions made. Further, the rules of procedural fairness are not breached merely because no submissions are received within the specified and the designated regulatory authority makes a determination, even if submissions are received after the determination is made.

If a designated regulatory authority decides to initiate proceedings in a designated tribunal, the designated regulatory authority is required to give written notice of that decision to the complainant and respondent (section 300(2)).

Designated tribunal

Section 301 provides that proceedings initiated in a designated tribunal are to be dealt with in accordance with the procedures of the tribunal concerned. The section also provides that, subject to any procedural requirements, a designated tribunal may determine proceedings without conducting a formal hearing, but is bound by the rules of procedural fairness.

General duties of designated local regulatory authorities

A number of general duties of designated local regulatory authorities are specified when dealing with complaints. These duties are to deal with all complaints properly made in accordance with the Uniform Law and Uniform Rules (section 315); to act in a fair manner when exercising or considering whether to exercise any discretions when dealing with a complaint, having regard to the respective interests of the complainant and the respondent, and the public interest (section 316); to deal with complaints efficiently and expeditiously (section 317); and to give the complainant and respondent written notice of a decision to close a complaint, of a determination made in relation to a complaint and a decision made as a result of an internal review of a complaint, including a statement of reasons for these decisions (unless it would be appropriate in the circumstances to dispense with notifying the party).

Internal review of decisions of designated regulatory authorities

A designated regulatory authority may (at its absolute discretion) conduct an internal review of a decision made by the designated regulatory authority or its delegate if it considers it appropriate to do so. In conducting an internal review, the designated regulatory authority is to consider whether the decision was dealt with appropriately and was based on reasonable grounds (section 313).

Appeals

The determination of a complaint by a (local) designated regulatory authority (i.e. a consumer matter complaint or a disciplinary complaint involving a finding of unsatisfactory professional conduct) is to be treated as final (section 312) apart from conducting an internal review (section 313). However, a respondent legal practitioner may, in accordance with applicable jurisdictional legislation, appeal to the (local) designated tribunal against, or seek a review of a determination by a (local) designated regulatory authority for a compensation order for more than \$10,000 or a determination and orders following a finding of unsatisfactory professional conduct by the (local) designated regulatory authority (section 314).

Attachment B

TAX AGENT SERVICES ACT 2009—SECTION 30-10—THE CODE OF PROFESSIONAL CONDUCT

Code Item 30-10(1)

You must act honestly and with integrity.

Comment

A solicitor must be honest and courteous in all dealings in the course of legal practice, and avoid any compromise to their integrity and professional independence (ASCR Rules 4.1.1 and 4.1.4)

Code Item 30-10(2)

You must comply with the taxation laws in the conduct of your personal affairs.

Comment

A solicitor must comply with the Australian Solicitors' Conduct Rules and the Law (ASCR Rule 4.1.5).

A conviction for a serious offence or a tax offence is an *automatic show cause event* (Uniform Law section 86).

A *tax offence* is any offence under the *Taxation Administration Act 1953*.

A practising certificate holder must give the regulator written notice of the *automatic show cause event* within 7 days and a written statement within 28 days explaining why, despite the show cause event, the practitioner considers himself or herself to be a fit and proper person to hold a practising certificate. The regulator may vary, suspend or cancel, or may refuse to renew a practising certificate if it does not consider the practitioner has shown in the statement that he or she is a fit and proper person, and the regulator is satisfied that the action to be taken is warranted in the circumstances (Uniform Law, sections 87–89).

Code Item 30-10(3)

If:

- (a) you receive money or other property from or on behalf of a client; and
 - (b) you hold the money or other property on trust;
- you must account to your client for the money or other property.

Comment

The general law principle is that where money is entrusted to an agent (including a legal practitioner) to hold for the benefit of another person, the agent becomes a trustee of that money. Part 4.2 of the Uniform Law and the Uniform General Rules

establishes an extensive regulatory regime governing the receipt, management and disbursement of trust money and trust property. Contravention of particular obligations gives rise to specified civil or criminal penalties. A law practice must not receive trust money unless a principal of the law practice is authorised to receive trust money. Trust records must be externally examined each financial year. Regulatory authorities may investigate, intervene and assume management of a law practice's trust money affairs.

Code Item 30-10(4)

You must act lawfully in the best interests of your client.

Comment

A solicitor must act in the best of a client in any matter in which the solicitor represents the client, must comply with the Australian Solicitors' Conduct Rules and the law, and must follow a client's lawful, proper and competent instructions (ASCR Rule 4.1.1, 4.1.5 and 8.1).

Code Item 30-10(5)

You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent.

Comment

Former clients

A solicitor and law practice must avoid conflicts between the duties owed to current and former clients. A solicitor in possession of relevant confidential information of a former client must not act for a current client unless the former client has given informed consent to the disclosure and use of the confidential information, or an effective information barrier has been established (ASCR Rule 10)

Current clients

A solicitor or law practice must avoid conflicts between the duties owed to two or more current clients. A solicitor or law practice must not act for two or more current clients with conflicting interests in the same or a related matter unless each client is aware of, and gives informed consent to, the solicitor or law practice so acting (ASCR Rules 11.1, 11.2 and 11.3).

Additionally, where confidential information is involved, a solicitor or law practice must not act for another current client unless the informed consent of each of the clients permits the disclosure and use of the confidential information for the benefit of the other client, or requires the establishment and maintenance at all times of an effective information barrier to protect the confidential information of each client (ASCR Rule 11.4).

Solicitor's own interests

A solicitor must not act for a client if there is a conflict between the duty to serve the best interests of the client and the interests of the solicitor or an associate of the solicitor, except in a limited range of permissible circumstances (ASCR Rule 12).

Code Item 30-10(6)

Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

Comment

A solicitor must not disclose any information which is confidential to a client without the client's express or implied consent, except where the solicitor is permitted or compelled by law to disclose, or in one of the other specified exceptions to the duty of confidentiality (ASCR Rule 9).

Code Item 30-10(7)

You must ensure that a tax agent service that you provide, or that is provided on your behalf, is provided competently.

Comment

A solicitor must deliver legal services competently, diligently and as promptly as reasonably possible (ASCR Rule 4.1.3).

A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for the matter (ASCR Rule 37).

Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure legal services are provided in accordance with the Uniform Law, Uniform Rules and other professional obligations (Uniform Law s. 34(1)(b)).

Code Item 30-10(8)

You must maintain knowledge and skills relevant to the tax agent services that you provide.

Comment

It is a statutory condition of an Australian practising certificate that the holder must comply with the applicable requirements of the Continuing Professional Development Rules (Uniform Law s.52).

Code Item 30-10(9)

You must 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 you are making or a thing you are doing on behalf of the client.

Comment

This is implicit in a number of professional obligations:

- a solicitor must act in the best of a client in any matter in which the solicitor represents the client, and must follow a client's lawful, proper and competent instructions (ASCR Rule 4.1.1 and 8.1).
 - legal costs charged in a matter must be fair and reasonable, having regard to the retainer and instructions (express or implied) given in the matter (Uniform Law s. 172(1) and 172(2)(f)).
 - where a detailed costs disclosure is made, the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs (Uniform Law s. 174(3)).
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Code Item 30-10(10)

You must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client.

Comment

A solicitor must deliver legal services competently, diligently, and as promptly as reasonably possibly (ASCR Rule 4.1).

A solicitor must follow a client's lawful, proper and competent instructions (ASCR Rule 8.1).

Code Item 30-10(11)

You must not knowingly obstruct the proper administration of the taxation laws.

Comment

A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty (ASCR Rule 3).

Code Item 30-10(12)

You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services you provide.

Comment

This is implicit in a number of obligations:

- a solicitor must deliver legal services competently, diligently, and as promptly as reasonably possibly (ASCR Rule 4.1).
 - a solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement (ASCR Rule 7.1).
 - where a detailed costs disclosure is made, the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs (Uniform Law s. 174(3)).
 - where a detailed costs disclosure is made, the disclosure must include information about the client's rights to seek the assistance of the designated regulatory authority in the event of a dispute about legal costs (Uniform Law s.174(2)(iv)).
-

Code Item 30-10(13)

You must maintain professional indemnity insurance that meets the Board's requirements.

Comment

The designated regulatory authority may grant or renew a practising certificate only if it is satisfied that the applicant, if required by the Uniform Law to have professional indemnity insurance—has or will have on or before the grant or renewal, professional indemnity insurance in accordance with the Uniform Law and Uniform Rules (Uniform Law s. 45(1)(b)).

An Australian legal practitioner must not engage in legal practice in a jurisdiction unless the practitioner holds or is covered by an approved insurance policy for that jurisdiction and the policy covers that legal practice (Uniform Law s.211).

Code Item 30-10(14)

You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.

Comment

Subject only to his or her duty to the client, a solicitor must be timely, open and frank in his or her dealings with a regulatory authority (ASCR Rule 43).

TAX AGENT SERVICES (CODE OF PROFESSIONAL CONDUCT) DETERMINATION 2023

Proposed Determination Item 10

Both as a registered tax agent or BAS agent, and in cooperation with other registered tax agents and BAS agents, you must:

- (a) uphold and promote the Code of Professional Conduct; and
- (b) protect public trust and confidence in the integrity of the tax profession and tax system; and
- (c) as a member of the tax profession, working collectively with other registered tax agents and BAS agents, take reasonable steps to hold each other accountable:
 - (i) for compliance with the Code; and
 - (ii) to protect public trust and confidence in the integrity of the tax profession and tax system.

Note: A registered tax agent or BAS agent has an obligation to notify the Board of significant breaches of the Code – see Subdivision 30-C of the *Tax Agent Services Act 2009*.

Comment

Re (a)-(b)

A solicitor must comply with the Australian Solicitors' Conduct Rules and the law (ASCR Rule 4.1.5).

A solicitor must avoid any compromise to their integrity and professional independence (ASCR Rule 4.1.4).

A solicitor must not engage in conduct, in the course of legal practice or otherwise, which is likely, to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice; or bring the profession into disrepute. (ASCR Rule 5)

Re (c)

A solicitor must comply with the Australian Solicitors' Conduct Rules and the law (ASCR Rule 4.1.5)

An Australian legal practitioner and a law practice must comply with the Uniform Law, the Uniform Rules and his, her or its other professional obligations, regardless of the business structure in which or in connection with which the legal services are provided (Uniform Law section 33).

Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that) all legal practitioner associates of the law practice comply with their obligations under this Law and the Uniform Rules and their other professional obligations; and that the legal services provided by the law practice are provided in accordance with this Law, the Uniform Rules and other professional obligations (Uniform Law section 34).

Re Note:

The collegiate nature of the legal profession fosters self-regulation among practitioners and their professional bodies to promote adherence to professional duties and obligations. There is no mandatory reporting of suspected misconduct, but a legal practitioner is not prohibited from lodging a disciplinary complaint (Uniform Law section 266(1)). However, a solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it (ASCR Rule 32).

Proposed Determination Item 15 False or misleading statements

Statements made to the Board or the Commissioner

- (1) You must not make a statement to the Board or the Commissioner that you knew, or ought reasonably to have known, is false, incorrect or misleading in a material particular, or omits any matter or thing without which the statement is misleading in a material respect, in your capacity as a registered tax agent or BAS agent or in any other capacity.

Note: For further obligations relating to false or misleading statements to the Commissioner see section 50-20 of the Tax Agent Services Act.

- (2) You must take all necessary steps to correct any statement you have given to the Board or the Commissioner, in any of your capacities, as soon as possible after you become aware that the statement was false, incorrect or misleading in a material particular, or omitted any matter or thing without which the statement is misleading in a material respect.

Statements made to other Australian government agencies

- (3) You must not make a statement to an Australian government agency (other than the Board or the Commissioner) that you knew, or ought reasonably to have known, is false, incorrect or misleading in a material particular, or omits any matter or thing without which the statement is misleading in a material respect, in your capacity as a registered tax agent or BAS agent.
- (4) You must take all necessary steps to correct any statement you have given to an Australian government agency (other than the Board or the Commissioner), in your capacity as a registered tax agent or BAS agent, as soon as possible after you become aware that the statement was false, incorrect or misleading in a material particular, or omitted any matter or thing without which the statement is misleading in a material respect.

Comment

A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty (ASCR Rule 3).

A solicitor must also avoid any compromise to their integrity and professional independence; and comply with these Rules and the law (ASCR Rules 4.1.4 and 4.1.5).

A solicitor must not engage in conduct, in the course of legal practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law; or which is likely, to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice; or bring the profession into disrepute.

See also *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148—it is improper to induce an opponent to make a mistake by means of deliberate misrepresentation. To foster or induce a mistake that may involve the opposing client in unnecessary expense or delay may misalign with a lawyer's duties to the profession, the community and the court. It is the *active* fostering or inducement of a mistake that is the main hallmark of unprofessional conduct, which the professional conduct rules prohibit.

Proposed Determination Item 20 Conflicts of interest in dealings with government

In relation to any activities you undertake for an Australian government agency in your capacity as a registered tax agent or BAS agent, you must:

- (a) take reasonable steps to identify and avoid any material conflict of interest (real or apparent) in connection with an activity undertaken for the agency (except to the extent that the agency has expressly provided otherwise); and
- (b) disclose the details, to the agency, of any material conflict of interest (real or apparent) that arises in connection with an activity undertaken for the agency as soon as you become aware of the conflict.

Comment

Where a solicitor undertakes activities for an Australian government agency as a client of the solicitor:

A solicitor or law practice must avoid conflicts between the duties owed to two or more current clients (ASCR Rule 11.1).

A solicitor or law practice must not seek to act for two or more current clients with conflicting interests in the same or a related matter unless each client is aware of, and gives informed consent to, the solicitor or law practice so acting (ASCR Rules 11.1, 11.2 and 11.3).

Additionally, where confidential information is involved, a solicitor or law practice must not act for another current client unless the informed consent of each of the clients permits the disclosure and use of the confidential information for the benefit of the other client, or requires the establishment and maintenance at all times of an effective information barrier to protect the confidential information of each client (ASCR Rule 11.4).

A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except in permissible circumstances (ASCR Rule 12).

Where an Australian government agency is a former client of a solicitor:

A solicitor and law practice must avoid conflicts between the duties owed to current and former clients (ASCR Rule 10.1).

A solicitor in possession of relevant confidential information of a former client must not act for a current client unless the former client has given informed consent to the disclosure and use of the confidential information, or an effective information barrier has been established (ASCR Rule 10.2)

There is no specific professional conduct rule dealing with the situation where an Australian government agency is not a current or former client of a solicitor, but the solicitor accepts an invitation to assist an Australian government agency in policy and legislation development. However, appropriate professional obligations with respect to conflicts of interest arising from accepting such an invitation can be drawn from a number of professional conduct rules:

A solicitor or law practice must avoid conflicts between the duties owed to current and former clients, or the duties owed to two or more current clients (ASCR Rules 10.1 and 11.1).

A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except in permissible circumstances (ASCR Rule 12).

A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty (ASCR Rule 3).

A solicitor must also be honest and courteous in all dealings in the course of legal practice and avoid any compromise to their integrity and professional independence (ASCR Rules 4.1.2 and 4.1.4).

A solicitor must not engage in conduct, in the course of legal practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law; or which is likely, to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice, or bring the profession into disrepute (ASCR Rule 5).

Proposed Determination Item 25 Maintaining confidentiality in dealings with government

Disclosure

- (1) Unless you have a legal duty to do so, you must *not* disclose any information you have received, directly or indirectly, from an Australian government agency in connection with any activities you undertake with the agency in your capacity as a registered tax agent or BAS agent except to the extent that all of the following apply:
 - (a) it is reasonable to conclude that the information received from the agency was authorised by that agency for further disclosure; and

- (b) any further disclosure of the information was done consistently with the agency's authorisation.

Use for personal advantage

- (2) You must not use any information you have received, directly or indirectly, from an Australian government agency in connection with any activities you undertake with the agency in your capacity as a registered tax agent or BAS agent for your personal advantage, or for the advantage of an associate, employee, employer or client, except to the extent that all of the following apply:
 - (a) it is reasonable to conclude that the that the information received from the agency was authorised by that agency to be used in a way that may provide for such a personal advantage; and
 - (b) any further use of the information was done consistently with the agency's authorisation.

Comment

There is no specific professional conduct rule dealing with the situation where a solicitor accepts an invitation to assist an Australian government agency in policy and legislation development and in the course of providing that assistance, receives information that might be advantageous to the interest of a client or the interests of the solicitor or an associate of the solicitor's. However, the duty to make available all information that is material and relevant to a client's matter is tempered by principles embodied in a number of professional conduct rules:

A solicitor must be honest and courteous in all dealings in the course of legal practice and avoid any compromise to their integrity and professional independence (ASCR Rules 4.1.2 and 4.1.4).

A solicitor must not disclose any information which is confidential to a client without the client's express or implied consent, except where the solicitor is permitted or compelled by law to disclose, or in one of the other specified exceptions to the duty of confidentiality (ASCR Rule 9).

A solicitor must not engage in conduct, in the course of legal practice *or otherwise*, which demonstrates that the solicitor is not a fit and proper person to practise law; or which is likely, to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice, or bring the profession into disrepute (ASCR Rule 5).

A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except in permissible circumstances (ASCR Rule 12).

A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter unless the former client has given informed consent to

the disclosure and use of that information; or an effective information barrier has been established (ASCR Rule 10).

A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients (ASCR Rule 11.1).

A solicitor or law practice must not seek to act for two or more current clients with conflicting interests in the same or a related matter unless each client is aware of, and gives informed consent to, the solicitor or law practice so acting (ASCR Rules 11.1, 11.2 and 11.3).

Additionally, where confidential information is involved, a solicitor or law practice must not act for another current client unless the informed consent of each of the clients permits the disclosure and use of the confidential information for the benefit of the other client, or requires the establishment and maintenance at all times of an effective information barrier to protect the confidential information of each client (ASCR Rule 11.4).

Proposed Determination Item 30 Keeping of proper client records

- (1) You must keep complete and accurate records relating to the tax agent services you have provided to each of your clients, including former clients.
- (2) The records must:
 - (a) be in English, or readily accessible and easily convertible into English; and
 - (b) be retained for at least 5 years after the service has been provided; and
 - (c) provide adequate details of all services provided (including information exchanged with the client, advice provided to the client, and for more complex matters: the relevant facts, assumptions and reasoning underpinning any advice provided to the client).

Comment

A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement (ASCR Rule 7.1).

As soon as practicable after receiving instructions to provide legal services, a law practice must open a file in respect of each matter. The file (at opening) must contain or have endorsed upon it the full name and address of the person, the date of receipt of the instructions, a short description of the services the law practice has agreed to provide, an identifier, and the contact details used by the law practice to contact the person to whom legal services are to be provided (Uniform General Rules 91E and 93(2)).

A solicitor with designated responsibility for a client's matter, must ensure that, upon completion or termination of the law practice's engagement, the client or former client, or another person authorised by the client or former client, is given any client documents as soon as reasonably possible when requested to do so by the client, unless there is an effective lien (ASCR Rule 14.1).

A solicitor or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legal obligations to the contrary (ASCR Rule 14.2).

Note also: trust records must be retained for a period of 7 years after the latter of the last transaction entry or completion of the matter (Uniform Law s147(2)(d)); PII policies must provide indemnity for run-off liabilities for a period of 7 years (Uniform General Rule 78(6)); a claim against a fidelity fund must be made within 6 months after the claimant became aware of the default or within such further time allowed by the fidelity authority or Supreme Court (Uniform Law section 236); and a 3 year period applies to making a complaint about conduct that has occurred, unless extended by the regulator (Uniform Law Section 272).

As a matter of practice, legal practitioners retain detailed client files recording the client instructions, the manner in which the matter was conducted and the legal services provided to the client.

Proposed Determination Item 35 Ensuring tax agent services provided on your behalf are provided competently

- (1) You must ensure that those providing tax agent services on your behalf maintain knowledge and skills relevant to the tax agent services they are providing.
- (2) You must ensure that those providing tax agent services on your behalf are appropriately supervised.

Comment

Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that all legal practitioner associates of the law practice (together with the law practice itself) comply with their obligations under the Uniform Law, the Uniform Rules and their other professional obligations (Uniform Law section 34).

A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter (ASCR Rule 37).

It is a statutory condition of an Australian practising certificate that the holder must comply with the applicable requirements of the Continuing Professional Development Rules (Uniform Law s.52).

Proposed Determination Item 40 Quality assurance and other internal controls

You must maintain adequate internal control procedures, in relation to your provision of tax agent services, to ensure your compliance with the Code of Professional Conduct.

Note: Adequate internal controls procedures could include a system for the quality assurance of the tax agent services being provided, and controls to maintain the proper keeping of records, protect confidentiality of information and the management of conflicts of interest.

Comment

Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that all legal practitioner associates of the law practice (together with the law practice itself) comply with their obligations under the Uniform Law, the Uniform Rules and their other professional obligations (Uniform Law section 34).

A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter (ASCR Rule 37).

The regulator may conduct, or appoint a suitably qualified person to conduct, an audit of the compliance of a law practice with the Uniform Law, the Uniform Rules and other applicable professional obligations if the regulator considers there are reasonable grounds to do so, based on the conduct of the law practice or one or more of its associates; or a complaint against the law practice or one or more of its associates (Uniform Law section 256).

The regulator may give a *management system direction* to a law practice if it considers it reasonable to do so after the conduct of any examination, investigation or audit. A *management system direction* is a direction to a law practice or class of law practices to ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the law practice, or by a law practice of that class, in accordance with the Uniform Law, the Uniform Rules and other professional obligations (Uniform Law section 257).

Proposed Determination Item 45 Keeping your clients informed of all relevant matters

You must advise all current and prospective clients, in writing and in a clear and unambiguous way, of all of the following:

- (a) any matter that could be reasonably relevant and material to a decision by a client to engage you, or to continue to engage you, to provide a tax agent service, as and when a matter arises;

- (b) upon engaging (or re-engaging) a client– that the Board maintains a register of tax agents and BAS agents and how they can access and search the register;
- (c) upon engaging (or re-engaging) a client– how they can make a complaint about a tax agent service you have provided, including the complaints process of the Board

Comment

Re (a)

A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement (ASCR Rule 7.1).

A law practice must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs. Also, a law practice must, when or as soon as practicable after there is any significant change to anything previously disclosed, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client (Uniform Law section 174(1)).

Where a disclosure is made the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs (Uniform Law section 174(3)).

Also (by way of example) the NSW Legal Services Commissioner must keep a Register of Disciplinary Action including disciplinary action taken under a law of NSW against Australian legal practitioners and make the Register available for public inspection on the internet site of the NSW Commissioner, or on another identified internet site (*Legal Profession Uniform Law Application Act 2014* (NSW section 152)).

Re (b)

If the Legal Services Council maintains an Australian Legal Profession Register, the Council must ensure that a current version of the Register is publicly available for inspection, without charge, at the Council's office during normal business hours and is publicly available, without charge, at all reasonable times on its website or another publicly accessible website (Uniform Law section 433).

Re (c)

Where a detailed costs disclosure is made, the disclosure must include information about the client's rights to seek the assistance of the designated regulator in the event of a dispute about legal costs (Uniform Law s.174(2)(iv)).