

Tax Agent Service (Code of Professional Conduct) Determination 2024

Scope of s 45(1)(a) of the Determination

Joint Opinion

1. We are instructed by Chartered Accountants Australia New Zealand to advise on the obligations of registered tax agents and BAS agents' (together, **agents**) under s 45(1)(a) of the *Tax Agent Service (Code of Professional Conduct) Determination 2024* (Cth) made pursuant to s 30-12 of the *Tax Agent Services Act 2009* (Cth). We understand the obligations come into effect on 1 August 2024, although the obligation in s 45(1)(a) relates to "matters" which have arisen on or after 1 July 2022: Determination: ss 2, 151.

Section 45(1)(a) – Disclosure of "matters"

2. Section 45(1)(a) requires an agent to disclose to current and prospective clients "any matter that could significantly influence a decision of a client "to engage or continue to engage an agent "to provide a tax agent service". Such matters must be disclosed at the time of a client making an inquiry to engage or re-engage the agent to provide tax agent services or within 30 days of the agent becoming aware of the matter: Determination, s 45(2).
3. The relevant type of matter which enlivens the obligation of disclosure is a matter which could significantly influence the decision of *a client* in respect of the engagement of the agent. This raises the prospect of a client having particular views, even idiosyncratic views, about attributes that might affect the suitability of an agent, which, in turn, would affect the agent's assessment of whether a particular matter relating to the agent must be disclosed. This would only become relevant where the agent is aware of the client's personal views on the subject. If an agent is not aware of the existence of a matter that might significantly influence a client, noting an agent's responsibilities to take reasonable care to ascertain a client's state of affairs in s 30-10(9) of the **Code** of Professional Conduct in the *Act*, the obligation of disclosure would not arise.
4. However, there is ambiguity as to whether the Determination is intended to require the disclosure of matters that might be significant to particular clients, but not other clients. The words in s 45(1), read in isolation, are apt to capture any matter that could significantly influence a decision of *any* of an agent's existing or prospective clients.

That tends to suggest that the agent is required to consider the likely attitude of existing or prospective clients both as a general class, but also in relation to the known attitude of particular individual clients or prospective clients. Other considerations of context suggest the Determination may not be intended to have quite so broad an operation. Section 45(2) of the Determination prescribes the manner and form requirements for making disclosures required by s 45(1). A notation following s 45(2) sets out examples which describe ways in which an agent could satisfy the obligation. Although the examples do not supplement the text of s 45, as a feature of the secondary material to be read together with the description in the Explanatory Statement, they tend to suggest that the matters which must be disclosed are generic in nature, in the sense that they do not need to be adapted to particular clients. This is consistent with the fact that the obligation applies to prospective clients, about whom an agent may know very little.

5. Those contextual considerations provide a basis to say that an agent is entitled to make an assessment about the likely attitude of clients *generally* when deciding what matters may need to be disclosed. However, adopting that approach would not be without risk. Given the words used in s 45(1) of the Determination, any particular client might complain about a failure to disclose a matter specific to their personal situation or idiosyncratic views. It will then be for the Tax Practitioners Board (TPB) to decide whether it commences an investigation into such a complaint. While it would be open to the TPB to adopt the same “generic” construction we have described, there is room for doubt as to whether that would be consistent with the terms of s 45.
6. The TPB has indicated on its website that “matters unrelated to a tax practitioner’s ability to provide tax agent services” are not within the scope of the relevant “matters”. That is said to include physical and mental health issues and personal, religious or political beliefs. The Explanatory Statement includes a non-exhaustive list of potentially relevant matters. Each relates to an agent’s history of compliance with the *Act*, including investigations and any outcomes of those investigations. However, as noted above, while the Explanatory Statement may assist in the construction of the word “matter” in s 45(1)(a) by identifying the mischief to which the Determination is directed, it does not control the meaning of the Determination and cannot be read as if it is a substitute for the text of the Determination.

7. We have some doubt about the correctness of the general statement by the TPB on its website that physical and mental health issues and personal, religious or political beliefs are incapable of being matters that are required to be disclosed under s 45.
8. It may be accepted as being implicit in s 45(1)(a) that it does not extend to matters which could have no rational connection with the provision of a tax agent service. The term "matter" must be read in the context of s 45(1)(a) which relates to the decision to engage or continue to engage an agent to provide a tax agent service and in light of the purpose of the Determination as expressed in the Explanatory Statement. The disclosure of personal matters about the agent which could not have a rational bearing on the capacity of the agent to provide services to the client, and have an effective working relationship with the client, would not serve the purpose of improving the transparency, accountability and integrity of the tax practitioner profession.
9. But it does not follow that personal matters, such as an agent's mental health, are incapable of being disclosable, because they may be rationally connected to a client's decision to engage an agent to provide a tax agent service. To take one example, if an agent was diagnosed with dementia, a client may well form a rational view that this is a fact that could significantly influence their decision to engage or continue to engage that agent to provide a tax agent service. That does not depend on the proposition that an agent is required to take into account the individual idiosyncrasies of particular clients. Even on a generic assessment, this would likely be a matter recognised as one that could significantly influence a decision of any client to engage an agent.
10. We expect, in light of the information on the TPB's website and for so long as that remains the TPB's public position, that the TPB would not investigate a complaint about a failure to disclose such a matter. We understand that the TPB does not investigate every complaint and it must notify an agent if it decides to commence an investigation: *Act*, s 60-95. However, this is more a reflection of the current approach of the TPB than a reliable indication of the legal scope of s 45 of the Determination. The expression of the TPB's interpretation or intention not to investigate particular matters on its website, or in any other forum, has no legal status. If the TPB were to diverge from its stated position in the future, an agent would not obtain any effective legal protection from the prior statements of the TPB.
11. The Explanatory Statement identifies an investigation of the TPB as a potentially relevant matter for the purpose of s 45(1)(a). While the inclusion of the example in the

Explanatory Statement is not an authoritative statement that an investigation *must* be disclosed by an agent to comply with s 45(1)(a), we consider that this is another matter which could rationally have a significant influence on a client's decision to engage an agent to provide a tax agent service. That reasoning may also extend to an investigation by another regulatory authority if connected with the capacity of an agent to provide a tax agent service.

Erroneous description of the effect of the Determination in the Statement of Compatibility with Human Rights

12. In keeping with usual practice, the Explanatory Statement for the Determination includes a Statement of Compatibility with Human Rights. In that Statement the obligation in s 45(1)(a) is described as “complementing” the TPB’s register of tax practitioners. That is not an accurate description of the Determination. For example, the register does not include any information about whether a tax practitioner is subject to an investigation by the TPB or any other agency or authority: *Tax Agent Services Regulation 2022, s 25B(1)*. In this respect, s 45(1)(a) goes beyond the scope of disclosure in the Register.
13. There is no apparent protection from the potential of significant reputational harm caused by an agent disclosing that they are under investigation by the TPB or any other regulatory authority. We note that the TPB has a period of 24 months in which to make a decision following the commencement of an investigation which may be extended: *Act, s 60-125*. In addition, an agent may have a limited ability to explain or defend the investigation to an existing or prospective client because of the confidentiality obligation in s 30-10(6) of the Code.

The limited relevance of the Guidance expected to be published by the TPB

14. The TPB has foreshadowed that it will be publishing Guidance, expected to be released in early September 2024, to assist agents in complying with the Determination. While such Guidance will be of assistance in demonstrating the likely attitude of the TPB to handling complaints about alleged non-compliance with the Determination, it is important to emphasise that the Guidance has no particular legal status and cannot change the true legal effect of the Determination. Nor would there be any sound basis to assume that the Guidance will remain the same in the future, and that the TPB’s

administration of s 45 of the Determination will always be consistent with the Guidance.

15. It follows that even if the Guidance adopts a narrow interpretation of the Determination (in particular the obligation to disclose matters under s 45) that will not be an effective cure to the ambiguities in, and problems with, the Determination that have been alluded to above.

16. We advise accordingly.

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