

Exposure Draft

TPB practice note TPB(PN) D40/2019

Letters of engagement

Tax Practitioners Board exposure draft practice note

The Tax Practitioners Board (TPB) has released this draft practice note to provide practical guidance and assistance to registered tax practitioners in relation to the use of letters of engagement.

Comments invited

The TPB invites comments and submissions in relation to this draft practice note. The comment period is open for 28 days with the closing date for submissions being 7 June 2019. The TPB will then consider any submissions before settling its position, undertaking any further consultation required and finalising the practice note.

Written submissions can be made via email at tpbsubmissions@tpb.gov.au or by mail to:

Tax Practitioners Board
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Disclaimer

This document is in draft form, and when finalised, will be intended as 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).

In addition, please note that the principles and examples in this draft TPB(PN) do not constitute legal advice. They are also at a preliminary stage only. The TPB's conclusions and views may change as a result of the comments the TPB receives or as other circumstances change.

Document history

This draft practice note was issued on 10 May 2019 and based on the TASA as at 15 March 2017. Once finalised, this draft practice note will replace *TPB(I) 01/2011: Letters of engagement*.

Issue date: 10 May 2019

Letters of engagement

Introduction

1. This draft practice note has been prepared by the Tax Practitioners Board (TPB) to provide practical guidance and assistance to registered tax agents, BAS agents and tax (financial) advisers (collectively referred to as tax practitioners) to understand the TPB's position in relation to the provision of letters of engagement to clients. For the purposes of this draft practice note, any reference to tax agent services includes BAS services and tax (financial) advice services, unless otherwise stipulated.
2. In this draft practice note, you will find the following information:
 - what is an engagement letter and what can it cover? (paragraphs 3 to 6)
 - are engagement letters required by the *Tax Agent Services Act 2009* (TASA)? (paragraphs 7 to 14)
 - what should an engagement letter contain? (paragraph 15 and 16)
 - the TPB's position in relation to recurring or ongoing engagements (paragraph 17)
 - where to find further information (paragraph 18)
 - the use of template or example letters of engagement (paragraph 19).

What is an engagement letter and what can it cover?

3. The agreement between a service provider and client which sets out the agreed terms and conditions of the engagement, when presented in the form of a letter, is sometimes referred to as an 'engagement letter'.
4. It is the TPB's view that using engagement letters can assist tax practitioners to establish a clear understanding of the elements of engagement between tax practitioners and their clients. Further, engagement letters are a simple way to set out the business practices the tax practitioner has in place to assure clients that the tax practitioner complies with the requirements of the TASA and to assist in avoiding uncertainty and misunderstandings, especially in relation to disputes over fees and about the scope of the work to be completed.¹

¹ In relation to the requirements relating to engagement letters for auditors, see *Aus 210 Terms of Audit Engagements*.

5. In relation to tax (financial) advisers, the *Corporations Act 2001* requires the provision of disclosure information at the commencement of a client engagement in certain circumstances, including the provision of a Financial Services Guide, general advice warning and Statements of Advice. Similarly, the TPB is of the view that all tax practitioners should provide and seek acceptance of relevant matters at the commencement of a client engagement, prior to the provision of tax agent services to the client. For tax (financial) advisers, this may be achieved in conjunction with the disclosure requirements contained in the *Corporations Act 2001*.
6. An engagement letter is the starting point in the ongoing communication between a tax practitioner and client about:
 - what is to be done
 - who will do it
 - how it will be done
 - when it is to be done
 - how much the work will cost.

Are engagement letters required by the TASA?

7. While engagement letters are not a specific requirement of the Code of Professional Conduct (Code) in the TASA, the TPB is of the view that the provision of engagement letters, covering the matters outlined in this draft practice note, is an important and effective mechanism to assist tax practitioners in ensuring that they comply with the requirements of the Code. It is for this reason that, when considering whether a tax practitioner has breached the Code, the TPB takes into account the existence and content of an engagement letter between the tax practitioner and client/s (where relevant). As such, the TPB strongly encourages the use of written agreements covering services as a means of avoiding uncertainty and misunderstandings and to assist in compliance with the Code.
8. The Explanatory Memorandum to the *Tax Agent Services Bill 2009* (EM) makes a number of references to how engagement letters can be used and how they are relevant in the business of tax practitioners.
9. For example, the EM suggests that the taxation rights and obligations that are relevant to a tax practitioner could be outlined in the engagement letter between the tax practitioner and client. Advising a client of their rights and obligations under the taxation laws that are materially related to the tax agent services that a tax practitioner provides is one of the requirements under the Code in the TASA.

10. Further, there are other legal and professional standards and regulatory requirements under which letters of engagement may be necessary. Examples include standards and requirements of ASIC (in relation to tax (financial) advisers), the Accounting Professional and Ethical Standards Board (APES 305 Terms of Engagement) and the Auditing and Assurance Standards Board.

11. The TPB considers that an effective engagement letter may assist tax practitioners in complying with the following principles of the Code, contained in section 30-10 of the TASA:

Code item 3 if you receive money or other property from or on behalf of a client and you hold the money or other property on trust, you must account to your client for the money or other property

Code item 4 you must act lawfully in the best interests of your client

Code item 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

Code item 7 you must ensure that a tax agent service that you provide, or that is provided on your behalf, is provided competently

Code item 8 you must maintain knowledge and skills relevant to the tax agent services that you provide

Code item 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

Code item 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

Code item 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.

12. While the TPB considers that engagement letters and similar agreements are an important step in ensuring compliance with these obligations, it is important to note that the existence of an engagement letter of itself will not constitute compliance with any of the requirements or obligations under the Code and the TASA.

13. For example, under Code items 9 and 10, tax practitioners are, in summary, required to take reasonable care in ascertaining a client's state of affairs and to ensure that taxation laws are applied correctly. We note that whether or not a tax practitioner has taken reasonable care of any kind will be a question of fact to be answered by the circumstances of a particular situation. The existence of an engagement letter will not on its own establish that reasonable care has been taken and these obligations cannot be transferred to the client.

14. For further information on the Code, please refer to Explanatory paper [TPB\(EP\) 01/2010 Code of Professional Conduct](#)

What should an engagement letter contain?

15. The TPB considers that letters of engagement or similar agreements will be particularly beneficial in assisting tax practitioners to comply with the Code, when they cover the following matters:
- the name and registration number of the tax practitioner that the client is appointing to perform the services. It is of advantage for the tax practitioner to identify the entity that, and/or the specific individuals who, will provide the tax agent service. This gives certainty to the client that the services will be performed by a person that is legally entitled to do so and is regulated under the TASA.
 - the identification of the client entities in relation to which the tax agent services are to be provided:
 - tax agent services include ascertaining and advising on liabilities, obligations or entitlements of an entity in circumstances where the entity can reasonably be expected to rely on the services
 - identification of the client entities for which services are to be provided clarifies the scope of the services as well as an understanding of the entities that may rely on the advice
 - clarifying the client entities will also inform the tax practitioner about the entities to which information may be disclosed, having regard to the practitioner's confidentiality and privacy obligations.
 - a description of the work that is to be performed:
 - a clear agreement as to the scope of the work to be performed limits the risk of misunderstandings between the client and the tax practitioner about the work to be performed and assists in an understanding and agreement on the time frames, and respective responsibilities
 - it also assists in an understanding that the scope of the work to be performed is within the practitioner's competency and experience.
 - the tax practitioner's and the client's responsibilities under the engagement, for example:
 - the client's responsibility to make all relevant information available to the tax practitioner in a complete and timely manner
 - the client's responsibilities as a taxpayer under the taxation laws and the consequence of errors and omissions from the information given to the taxation authorities
 - the tax practitioner's responsibility to provide the services in a competent and timely manner
 - the letter may provide that the tax practitioner may seek clarification of some matters where there is a need to do so, but that the tax practitioner will not audit the information provided by the client as the tax practitioner is satisfied that the client understands their record keeping obligations and is aware of the consequences of not keeping adequate records
 - the tax practitioner's responsibility to ensure that the taxation laws are complied with and that the tax practitioner may be liable for civil penalties for false and misleading statements made to the taxation authorities
 - the tax practitioner's responsibility to lodge in a timely manner

- the form of any reports or other means of communication relevant to the tax agent services to be performed
- an explanation as to the extent to which the tax agent services can be relied upon and the limitation on other persons relying on the advice or on calculations contained in the report or advice
- the confidential nature of the communications between the client and the tax practitioner and that the tax practitioner will not disclose information relating to the client's affairs to a third party without the client's permission (unless the tax practitioner has a legal duty to do so). The engagement letter may also be utilised by tax practitioners to clearly inform clients of any disclosures to third parties and obtaining the client's permission in relation to such disclosures (for example, by a return signed engagement letter or consent from the client), in order to satisfy the requirements of Code item 6 in the Code. For further information in relation to the client confidentiality requirements in the Code, refer to [TPB\(I\) 21/2014 Code of Professional Conduct – Confidentiality of client information](#) and [TPB\(I\) 32/2017: Code of Professional Conduct - Confidentiality of client information for tax \(financial\) advisers](#)
- any arrangements for retention of the client's documents or of making copies of them for the purposes of providing the services under the agreement or to secure payment of fees
- the duty (under the TASA) of the tax practitioner to act lawfully in the best interest of the client, and to act honestly and with integrity
- situations in which the law overrides the duty of the tax practitioner to the client, such as compliance with notices under sections 263 and 264 of the *Income Tax Assessment Act 1936*, withholding tax obligations and any other duties of the tax practitioner under the TASA (including the Code)
- adequate arrangements the tax practitioner has in place for the management of conflicts of interest that may arise in relation to the activities undertaken in the capacity of a tax practitioner
- the rights and obligations of the client under the taxation law. For example, if the agreement extends to the preparation and lodgement of taxation returns, the agreement could advise the client of the self-assessment system and of the rights of objection and appeals. The engagement letter might also be useful to describe the nature of the rulings system and that the client will be advised where the returns have been prepared in reliance on binding rulings issued by the Commissioner of Taxation (note however this may not be appropriate in all situations when considering factors such as the client and the costs involved in producing the extra information)
- the basis on which fees are to be calculated and charged, the frequency of billings and the time frame for payment. As disputes about fees often arise, the engagement letter can limit the capacity for misunderstandings and provide the client with clear expectations about the amount that the tax agent services are likely to cost
- in relation to tax agents, how the tax agent will deal with any tax refund the tax agent receives on behalf of the client and whether the client consents to fees being deducted from a refund

- how the tax practitioner will deal with funds or other property held on trust for the client
 - the details of any limitation of liability of the tax practitioner for work performed under the engagement and the legal basis for the limitation if it is a feature of the law of the jurisdiction in which the tax practitioner practises
 - the client's responsibility to advise the tax practitioner of changes in any matter that is relevant to the tax practitioner's services that are provided
 - the professional indemnity insurance arrangements the tax practitioner has in place
 - the mechanisms available for resolving any disputes that arise between the client and tax practitioner, including internal dispute resolution arrangements and making complaints to the TPB.
16. Separate engagement letters should be issued for each client in receipt of your services, unless it is agreed otherwise. For example, separate letters should be issued if you provide tax services to both:
- a husband and wife
 - a partnership and the individual partners
 - a company and its shareholders
 - a company and its directors
 - the trustees of a settlement and its beneficiaries.

Recurring or ongoing client engagements

17. In relation to recurring or ongoing engagements, it is the TPB's position that new engagement letters or similar agreements should be provided to clients on an annual basis. Further, the TPB would expect that a new engagement letter or similar agreement is provided to clients in certain circumstances, including but not limited to the following:
- there is reason to believe that the client has misunderstood the terms and scope of the engagement
 - there are changes in the terms or scope of the engagement
 - there is a change to the management, ownership and or structure to the client (particularly relevant to corporate entities and clients that are part of a corporate group)
 - there is a change in the nature or size of the client's business

- there is a change in any relevant or applicable laws or regulations
- there has been a change to the third party recipients of client information (which requires prior client consent in accordance with Code item 6 of the Code).

Further information

18. Outlined below is a listing of reference material that may provide further guidance in relation to letters on engagement:

	Information product	Purpose of document
Tax Practitioners Board	TPB(I) 15/2012: Code of Professional Conduct – Holding money or other property on trust	Further information regarding Code item 3 in the <i>Tax Agent Services Act 2009</i> – holding money or other property on trust.
	TPB(I) 27/2016 Acting lawfully in the best interests of clients for tax (financial) advisers	Further information regarding Code item 4 in the <i>Tax Agent Services Act 2009</i> – acting lawfully in the best interest of clients for tax (financial) advisers
	TPB(I) 19/2014: Code of Professional Conduct - Managing conflicts of interest for registered tax and BAS agents	Further information regarding Code item 5 in the <i>Tax Agent Services Act 2009</i> – having adequate arrangements for managing conflicts of interest for registered tax and BAS agents.
	TPB information sheet TPB(I) 30/2016 Code of Professional Conduct – Having adequate arrangements for managing conflicts of interest for tax (financial) advisers	Further information regarding Code item 5 in the <i>Tax Agent Services Act 2009</i> – managing conflicts of interest for tax (financial) advisers.
	TPB(I) 32/2017: Code of Professional Conduct - Confidentiality of client information for tax (financial) advisers	Further information regarding Code item 6 in the <i>Tax Agent Services Act 2009</i> – confidentiality for tax (financial) advisers.
	TPB information sheet TPB(I) 21/2014 Code of Professional conduct –	Further information regarding Code item 6 in the <i>Tax Agent</i>

	Information product	Purpose of document
	Confidentiality of client information	<i>Services Act 2009</i> – confidentiality.
	TPB(I) 17/2013 Reasonable care to ascertain a client's state of affairs	Further information regarding Code item 9 in the <i>Tax Agent Services Act 2009</i> – reasonable care to ascertain a client's state of affairs.
	TPB(I) 18/2013 Code of Professional Conduct - Reasonable care to ensure taxation laws are applied correctly	Further information regarding Code item 10 in the <i>Tax Agent Services Act 2009</i> – reasonable care to ensure taxation laws are applied correctly.
	TPB(PN) 1/2017: Cloud computing and the Code of Professional Conduct	Further information regarding the TPB's position in relation to cloud computing.
	TPB(PN) 2/2018: Outsourcing and offshoring of tax services - Code of Professional Conduct considerations	Further information regarding the TPB's position in relation to outsourcing and offshoring of tax agent services.
Accounting Professional & Ethical Standards Board	APES 305 Terms of Engagement	Provides information in regard to terms of engagement.
Auditing and Assurance Standards Board	Auditing Standard ASA 210 Terms of Audit Engagements	Establishes mandatory requirements and provides explanatory guidance on terms of audit engagements.
Australian Securities and Investments Commission	Regulatory Guide 244 Giving information, general advice and scaled advice	Provides guidance on how to meet the advice obligations in Chapter 7 of the <i>Corporations Act 2001</i> .
Office of Australian Information Commissioner	Guide to securing personal information	Provides guidance on protecting personal information and in relation to destroying or de-identifying personal information once information is no longer needed.

	Information product	Purpose of document
	Australian Privacy Principle Guidelines	Outlines requirements of the Australian Privacy Principles (APPs), how the OAIC will interpret the APPs, and matters the OAIC may take into account when exercising functions and powers under the <i>Privacy Act 1988</i> (Cth).

Template or example letters of engagement

19. While the TPB does not consider it appropriate to provide a template or example letters of engagement or similar agreements for tax practitioners, the TPB understands that many TPB recognised professional associations offer such templates or examples to their members. The TPB welcomes the use of examples and templates by tax practitioners, however, the TPB considers that it is important for tax practitioners to use their professional judgement in considering the matters that are addressed in their letters of engagement, beyond or in contrast to the matters set out in any examples or templates they are utilising, having regard to their practice and their engagement with each client.