

# TPB Information Sheet

## TPB(I) 19/2014

### Code of Professional Conduct – managing conflicts of interest

#### Disclaimer

This is a Tax Practitioners Board (TPB) Information sheet (TPB(I)). It is intended to be for information only. It provides information regarding the TPB's position on the application of subsection 30-10(5) of the *Tax Agent Services Act 2009 (TASA)*, containing one of the obligations of registered agents under the Code of Professional Conduct (Code) (Code item 5). 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 TASA.

In addition, please note that the principles, explanations and examples in this TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law. Please refer to the TASA for the precise content of the legislative requirements.

#### Document history

The TPB released this document as a draft information sheet in the form of an Exposure draft on 30 July 2013. The TPB invited comments and submissions in relation to the information in it. The closing date for submissions was 13 September 2013. The TPB considered the submissions made and released the document as a final information sheet on 13 January 2014.

On 12 October 2015 the TPB updated this TPB(I) to incorporate a reference to tax (financial) advisers.

On 14 February 2017 the TPB updated this TPB(I) to incorporate a reference to the TPB information sheet on Code item 5 for tax (financial) advisers.

On 26 November 2019, the TPB updated this TPB(I) to incorporate further guidance concerning the duty to disclose conflicts of interest and an example relating to the management of conflicts of interest in the context of audit insurance policy offerings to clients.

On 5 December 2023 the TPB made further changes to this TPB(I) to include specific requirements for tax agents with a tax (financial) advice services condition on their registration.

Issue date: 13 January 2014

Last updated: 5 December 2023

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# Introduction

1. This Information sheet (TPB(I)) has been prepared by the Tax Practitioners Board (TPB) to assist registered tax and BAS agents (registered agents) to understand their obligations under subsection 30-10(5) of the *Tax Agent Services Act 2009* (TASA) (Code of Professional Conduct (Code) item 5).<sup>1</sup> While the focus of this TPB(I) is on Code item 5, it is also important to note that there are 13 other items in the Code<sup>2</sup> and additional requirements in relation to being a 'fit and proper' person<sup>3</sup> which may also be relevant.
2. In this TPB(I), you will find the following information:
  - what the obligation is under Code item 5
  - consequences for failing to comply with Code item 5
  - practical examples.

## What is the obligation under Code item 5?

3. Code item 5 requires registered agents to have adequate arrangements in place for the management of conflicts of interest that may arise in relation to the activities that they undertake in their capacity as a registered agent.<sup>4</sup>
4. Adequate arrangements for the management of conflicts of interest assist to minimise potential adverse impacts on clients and others. In particular, it reduces threats to objectivity and the confidentiality of client information. This in turn helps to promote consumer protection and maintain integrity of the profession.
5. Code item 5 does not prohibit registered agents from having conflicts of interest. However, it does create an obligation to appropriately manage conflicts that arise or may arise in relation to activities that are undertaken in the capacity of a registered agent.

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<sup>1</sup> The TPB administers a system for the registration of tax agents, BAS agents and tax (financial) advisers (known collectively as 'tax practitioners') under the *Tax Agent Services Act 2009* (TASA). The TPB has also published specific information regarding the obligations of registered tax (financial) advisers under the Code of Professional Conduct in the TASA, including [TPB\(I\) 30/2016 Code of Professional Conduct - Having adequate arrangements for managing conflicts of interest for tax \(financial\) advisers](#) (Code item 5).

<sup>2</sup> The TPB has also published an explanatory paper that sets out its views on the application of the Code, including Code item 5. Refer to TPB Explanatory paper [TPB\(EP\) 01/2010 Code of Professional Conduct](#).

<sup>3</sup> For further information, see TPB Explanatory paper [TPB \(EP\) 02/2010 Fit and proper person](#).

<sup>4</sup> In relation to tax agents with a tax (financial) advice services condition, the Code does not apply to conduct when providing financial services (as opposed to tax (financial) advice services).

6. The Accounting Professional and Ethical Standards Board (APESB) has released *APES 110 Code of Ethics for Professional Accountants* (APES 110) and *APES 220 Taxation Services* (APES 220), standards which apply to members of relevant professional bodies that have adopted it. While not binding on all registered agents, these standards provide useful guidance on what steps an agent can take to ensure an agent has adequate arrangements in place for the management of conflicts of interest that may arise in relation to activities that are undertaken in the capacity of a registered agent. APES 110 notes, among other things, that a member is required to not allow conflict of interest to override professional or business judgments,<sup>5</sup> while *APES 220 Taxation Services* also outlines requirements as to objectivity.

## What is a 'conflict of interest'?

7. A conflict of interest is where a registered agent has a personal interest or has a duty to another person which is in conflict with the duty owed to the client.
8. A conflict of interest may be an actual or potential conflict. Also, it can arise before the registered agent accepts an engagement or at any time during the engagement. A registered agent has a duty to manage actual and potential conflicts of interest.
9. An actual conflict of interest arises where a registered agent has multiple interests and cannot objectively and impartially act in one of the interests.
10. A potential conflict of interest arises where a registered agent has multiple interests and one interest could possibly impact the motivation to act for another interest.

## What are 'adequate arrangements for the management of conflicts of interest'?

11. Registered agents must have adequate arrangements to identify and manage conflicts of interest that arise or may arise. A determination of whether conflict management arrangements employed by a registered agent are sufficiently adequate will be a question of fact having regard to the particular circumstances of the matter in question.<sup>6</sup>
12. A number of mechanisms could be used to manage a conflict and it will be up to a registered agent to exercise their professional judgement to determine the most appropriate method for managing a particular conflict of interest.

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<sup>5</sup> See APES 110 *Code of Ethics for Professional Accountants*, sections 100, 220 and 310 on the Accounting Professional & Ethical Standards Board website at [www.apesb.org.au](http://www.apesb.org.au)

<sup>6</sup> See, for example, *ASIC v Citigroup Global Markets Australia Pty Ltd* (ACN 113 114 832)(No. 4) [2007] FCA 963

13. Three mechanisms that registered agents may use to manage conflicts of interest are:

- disclosing conflicts of interest
- controlling conflicts of interest
- avoiding conflicts of interest.<sup>7</sup>

## Disclosing conflicts of interest

14. Where there is a conflict of interest, registered agents should disclose the conflict to their clients. Disclosure should:

- be made at the earliest possible opportunity
- be specific and meaningful to the client
- occur before or when the tax agent service is provided, but in any case, at a time that allows the client a reasonable time to assess its effect
- refer to the specific service to which the conflict relates.

15. The form of the disclosure must be sufficient to allow an informed decision to be made about how the conflict may affect the services being provided and about its management. It is recommended that a registered agent obtain the client's positive consent or affirmation to act in such circumstances. Positive consent would be obtained where the client has considered all the relevant information and disclosures, including disclosure of any commissions which would be or have been received. It is recommended that positive consent or affirmation be by way of a written statement from the client.

16. Where a registered agent intends to accept instructions from more than one party to any transaction, it is recommended that, before accepting any form of consideration, the registered agent is satisfied that each of the parties is aware that the registered agent is intending to act for the others and that there is consent for the registered agent to continue to act.

17. Further to paragraph 16 above, where one of the parties refuses to provide the requested consent, the registered agent should consider declining to act for that party.

## Controlling conflicts of interest

18. Controlling conflicts of interest requires a registered agent to:

- identify the conflicts of interest relating to the tax or BAS agent practice
- assess and evaluate those conflicts
- decide upon, and implement, appropriate responses to those conflicts.

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<sup>7</sup> For further information for tax agents with a tax (financial) advice services condition in relation to these mechanisms, see also ASIC Regulatory Guide RG 181: *Licensing: Managing conflicts of interest*.

19. Depending on the circumstances, a registered agent may also be able to control a conflict of interest by physically and intellectually separating and isolating persons within the registered agent practice who will provide the relevant advice from persons who are privy to material information which may influence the advice. This is sometimes referred to as an 'ethical wall' (previously known as a 'Chinese wall').<sup>8</sup>
20. In some cases, ethical walls may be an ineffective form of conflict management, noting that there is a risk of leakage and that there also needs to be an appropriate understanding of written policies and procedures.<sup>9</sup>
21. In some instances, it may be necessary and appropriate for a registered agent to suggest to their client that, notwithstanding any advice provided by the registered agent, the client should obtain independent advice in the circumstances.
22. In all cases, it is recommended that a registered agent keep adequate records of the steps taken to control conflicts of interest.

### **Avoiding conflicts of interest**

23. Registered agents are required to ensure their objectivity is not impaired by a conflict of interest. In some cases, regardless of arrangements put in place, conflicts of interest will be unmanageable and the only way to adequately manage the conflict will be to avoid it altogether. This will generally require the registered agent to decline to act for the client.

### **Other techniques for managing conflicts of interest**

24. Additional techniques that may assist a registered agent to manage conflicts of interest include:
  - placing a positive onus on employees or anyone else providing relevant services on behalf of the registered agent to declare conflicts of interest, including reporting to appropriate people and signing relevant declarations as appropriate
  - developing a register of private interests (in conjunction with appropriate protocols) and regularly revising the register
  - reviewing conflict of interest declarations periodically
  - relevant training, including to employees or anyone else providing relevant services on behalf of the registered agent, to ensure appropriate awareness and understanding of what constitutes a conflict of interest and how to act in accordance with relevant internal procedures and protocols (including, for example, escalation procedures)
  - seeking advice from an independent third party, which may include legal advice.<sup>10</sup>

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<sup>8</sup> It is noted that previous decided cases make reference to the term 'Chinese walls'. See, for example, *ASIC v Citigroup Global Markets Australia Pty Ltd* (ACN 113 114 832) (No. 4) [2007] FCA 963 and *Bureau Interprofessional Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588.

<sup>9</sup> See, for example, *ASIC v Citigroup Global Markets Australia Pty Ltd* (ACN 113 114 832) (No. 4) [2007] FCA 963 and *Bureau Interprofessional Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588

<sup>10</sup> See, for example, APES 110 *Code of Ethics for Professional Accountants*, sections 220 and 310 on the Accounting Professional & Ethical Standards Board website at [www.apesb.org.au](http://www.apesb.org.au)

## Consequences for failing to comply with Code item 5

25. If a registered agent does not have in place adequate arrangements for the management of conflicts of interest that may arise in relation to activities that are undertaken in the capacity of a registered agent, the TPB may find that the registered agent has breached the Code and may impose sanctions for that breach.
26. If a registered agent breaches the Code, the TPB may impose one or more of the following sanctions:
  - a written caution
  - an order requiring the registered agent to do something specified in the order
  - suspension of the registered agent's registration
  - termination of the registered agent's registration.
27. In addition, the same conduct which may amount to a failure to have adequate arrangements in place for the management of conflicts of interest, under Code item 5, could also constitute a breach of another Code item (such as confidentiality and acting with honesty and integrity).
28. Ultimately, determining whether a registered agent has complied with their obligations under Code item 5 will be a question of fact. This means that each situation will need to be considered on a case-by-case basis having regard to the particular facts and circumstances.

## Comparison with the *Corporations Act 2001* (Cth) for tax agents with a tax (financial) advice services condition

29. The TPB recognises that the obligations of some Australian financial services (AFS) licensees and their representatives under the Corporations Act are similar to some obligations under the TASA.
30. Ultimately, while compliance with relevant *Corporations Act 2001* (Corporations Act) and Australian Securities and Investments Commission (ASIC) requirements will be a relevant factor, it is not conclusive in relation to whether obligations under Code item 5 in the TASA have been satisfied.
31. In particular, it is noted that paragraph 912A(1)(aa) of the Corporations Act provides that a financial services **licensee** must:
  - have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative.

32. In addition, subsection 961B(1) of the Corporations Act requires that, in the provision of personal advice to a person as a retail client, the **provider** must act in the best interests of the client in relation to the advice (best interests duty).
33. Further, the best interests duty is supplemented by subsection 961J(1) of the Corporations Act which requires that if the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of the provider or their related parties (such as licensees, authorised representatives and associates), the provider must give priority to the client's interests when giving the advice (Conflicts priority rule).<sup>11</sup>
34. The primary distinction between the obligation under Code Item 5 and the best interests duty / conflicts priority rule is that Code Item 5 requires that the tax (financial) adviser has arrangements in place for managing actual or potential conflicts of interest that may arise. In comparison, the best interests duty / conflicts priority rule under the Corporations Act is more narrowly focused on how to deal with an actual conflict of interest.
35. Further, the best interests duty / conflicts priority rule under the Corporations Act merely requires that the client's interests be prioritised in the event of an actual conflict, whereas Code Item 5 is broader and requires that arrangements must be in place to avoid, control and/or disclose actual or potential conflicts of interest in relation to the activities that a tax agent undertakes in their capacity as a tax agent.<sup>12</sup>
36. Another distinction between the obligation under Code Item 5 and the best interests duty / conflicts priority rule is that Code Item 5 applies broadly to the personal and professional conduct of all registered tax practitioners (in relation to the activities that a practitioner undertakes in their capacity as a tax practitioner).<sup>13</sup> In comparison, the best interests duty / conflicts priority rule under the Corporations Act only applies to those providing personal advice to retail clients).
37. It is noted that if an AFS licensee or an authorised representative of an AFS licensee fails to comply with the Corporations Act (including the best interests duty), they may be liable for:
  - a civil penalty<sup>14</sup> and / or
  - an order for compensation for loss or damage suffered by the client.<sup>15</sup>

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<sup>11</sup> Generally, compliance with the best interests duty under the Corporations Act is met by following the safe harbour steps set out in subsection 961B(2) of the Corporations Act. For further information, see ASIC Regulatory Guides *RG 175: Licensing: Financial product advisers - conduct and disclosure* and *RG 244: Giving information, general advice and scaled advice*.

<sup>12</sup> See also paragraphs 11 to 23 in this information sheet. In particular, a registered tax practitioner should use their professional judgment to determine the most appropriate method to identify and manage a particular conflict.

<sup>13</sup> For further information on what constitutes a tax (financial) advice service, including facts and circumstances considered in determining whether a client can reasonably be expected to rely on a service being provided, refer to [TPB\(I\) 20/2014: What is a tax \(financial\) advice service?](#)

<sup>14</sup> See sections 961K and 961Q of the Corporations Act.

<sup>15</sup> See section 961M of the Corporations Act.



## Practical examples involving Code item 5

38. Outlined below are possible indicative examples for the purpose of illustrating the general application of Code item 5.
39. In all cases, consideration will need to be given to the specific facts and circumstances. In any given situation, a number of mechanisms could be used to manage a conflict and it will be up to a registered agent to exercise their professional judgement to determine the most appropriate method for managing a particular conflict of interest.

### Example 1 – Marital break-up

#### Situation

Terrence and Sandra have recently divorced. They have used the same registered tax agent, Craig, for the past seven years. In preparing their respective income tax returns for the current financial year, it becomes apparent to Craig that the claiming of a rebate or offset by Terrence would prevent the claiming of the rebate or offset by Sandra.

#### Conflict of interest

Craig has a conflict of interest if he acts for both Terrence and Sandra because they have competing interests in relation to the claim for a rebate or offset. Additionally, a perceived conflict may arise in regard to one or both of the clients holding any belief that Craig may not be able to objectively provide appropriate and impartial services to each of the clients.

#### Managing the conflict of interest

Craig appropriately discloses his conflict of interest to Terrence and Sandra and receives a waiver from both parties in relation to the conflict.

In applying his professional judgment, Craig determines that the rebate or offset is more properly claimable by Terrence. However, Craig also identifies that he is in a position wherein his duty to Sandra is in conflict with his duty to Terrence.

In this case, Craig has satisfied his obligations under Code item 5 by appropriately disclosing his conflict of interest and obtaining a waiver from Terrence and Sandra prior to preparing their respective income tax returns.

#### Alternative Scenario

If Craig were unable to obtain the relevant waiver from Terrence and Sandra, it is unlikely that he would be able to adequately manage the conflict of interest, regardless of other arrangements that could be put in place, and should consider declining to act for one or both of Terrence and Sandra.

## Example 2 – Registered agent has a personal interest

### Situation

Anthony is a long-time client of Lucia's, a registered BAS agent. Anthony asks Lucia to assist him to identify an appropriately qualified tax agent to provide advice in relation to his self-managed superannuation fund. Lucia is aware of a number of suitable registered tax agents but refers Anthony to Nathan Accounting Pty Ltd because she receives a commission for the referral from this firm.

### Conflict of interest

Lucia has a financial incentive in referring Anthony to Nathan Accounting Pty Ltd as opposed to another registered tax agent and, therefore, has a conflict of interest in the circumstances.

### Managing the conflict of interest

Lucia appropriately discloses her conflict to Anthony by advising him that she will receive a commission if he engages the services of Nathan Accounting Pty Ltd.

In this case, Lucia has satisfied her obligations under Code item 5 by disclosing her conflict of interest to Anthony when referring him to Nathan Accounting Pty Ltd.

## Example 3 – Clients in the same industry and registered agent with personal interest

### Situation

Christina is a registered tax agent and has a number of long-time clients, one of which is Cold Cream, a large ice-cream retailing franchise. Christina has a 15 percent ownership interest in Cold Cream.

Christina is approached by Ice Cold, a rival ice-cream retailing franchise to provide tax agent services including tax planning work.

### Conflict of interest

Christina has a potential conflict of interest if she provides tax agent services to Ice Cold because her ownership interest in Cold Cream could possibly impact her motivation to act in the best interests of Ice Cold.

### Managing the conflict of interest

Christina appropriately identifies and discloses her potential conflict of interest to Ice Cold. Further, Christina determines that, in the circumstances, she cannot objectively provide tax agent services to Ice Cold and therefore the conflict of interest is unmanageable and the only way to adequately manage the conflict will be to avoid it altogether. Accordingly, Christina declines to act for Ice Cold.

In this case, Christina has satisfied her obligations under Code item 5 by disclosing her conflict of interest, and avoiding the conflict by declining to act for Ice Cold.

## Example 4 – Representing two clients involved in a merger transaction

### Situation

Victor Lance Accounting, a large accounting firm and registered tax agent, is engaged by Caxton Ltd and Devon Ltd, two publicly listed companies, to provide confidential tax advice in relation to a potential merger transaction with one another.

### Conflict of interest

Victor Lance Accounting has an actual conflict of interest if it acts for both Caxton Ltd and Devon Ltd because both companies are seeking confidential tax advice from the same registered tax agent.

### Managing the conflict of interest

Victor Lance Accounting appropriately discloses the conflict of interest to both Caxton Ltd and Devon Ltd. Further, Victor Lance Accounting advises each of the companies of how it intends to control and avoid the conflict of interest. Relevant strategies include identifying and evaluating the conflict of interest, implementing and enforcing strict policies and procedures in relation to controlling the conflict, and assigning separate teams in different offices to work for the two companies. Details relevant to each of the companies will not be discussed by the relevant teams. Finally, Victor Lance Accounting obtains a waiver from each of the companies in relation to the conflict.

By taking these steps, Victor Lance Accounting has satisfied its obligations under Code item 5 to have in place adequate arrangements for the management of the conflict of interest.

## Example 5 – Audit insurance and registered agent with personal interest

### Situation

Luis is a registered tax agent and works for a large accounting firm. The accounting firm has a tax audit insurance policy with ABC Pty Ltd. This policy covers clients who sign up to the policy for the professional fees associated with dealing with tax audits, enquiries, investigations or reviews of tax returns lodged with the Australian Taxation Office.

Luis is approached by David, a new client of the accounting firm, regarding the lodgement of his tax return. As part of the service offered to David, Luis advises David that he should have tax audit insurance and David agrees to be added to the policy. As a result, Luis will receive a portion of the commission received by the insurance broker who sold the policy to the accounting firm for the addition of David to the policy.

### Conflict of interest

Luis has a financial incentive for referring David to the tax audit insurance policy as he will receive a commission for the addition of David to the policy and will have his fees paid in the event of an audit. Therefore, Luis has a conflict of interest in the circumstances.

It also raises questions as to whether Luis has acted in the best interests of his client (a requirement under Code item 4) and whether the appropriateness of the policy to David's circumstances was considered.

### **Managing the conflict of interest**

Luis appropriately identifies and discloses the conflict to David by advising him that he will receive a commission if David decides to take out the tax audit insurance. As part of his duty to manage conflicts of interest, Luis also discloses to David the amount of the commission that he will receive. In this case, Luis has satisfied his obligation under Code item 5 by disclosing his conflict of interest to David when referring him to the tax audit insurance policy.<sup>16</sup>

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<sup>16</sup> The principles outlined in TPB(I) 19/2014 in relation to adequate arrangements for the management of conflicts of interest also apply to other models of tax practitioner remuneration relating to audit insurance policies offered to clients.