

## Why seek SMSF, tax or other advice from a lawyer — are there any benefits?

In light of recent changes to the professional and ethical obligations on tax practitioners, it is important for clients and advisers to consider who to seek guidance from. This article discusses certain advantages of engaging a lawyer for advice or assistance.

### Background

The *Tax Agent Services Act 2009* (Cth) (**TASA**) has recently been amended to include reporting provisions that require tax agents and BAS agents (**Tax Agents**) to track and report professional code breaches by themselves or other tax agents to the Tax Practitioner's Board (**TPB**) (ie, the government body that regulates these agents).

Tax Agents will soon also be required to report clients that have made false or misleading statements to the Australian Taxation Office (**ATO**).

Thus, the choice of adviser is critical for clients to determine whether that adviser might be under an obligation to report them due to express legislative obligations and whether communications between client and adviser will remain confidential.

Only legal advice from a lawyer is subject to the protection of confidentiality and legal professional privilege (**LPP**). Most importantly, outside of extremely limited circumstances, lawyers are not required to report on their clients.

### Legal professional privilege

LPP protects the confidentiality of communications between a lawyer and client where the dominant purpose of the communication is giving or obtaining legal advice or in relation to pending/contemplated litigation.<sup>1</sup> Therefore, confidential information disclosed between a lawyer and a client will be subject to LPP provided it satisfies the dominant purpose test.

This unique client-lawyer relationship encourages candidness and full and frank discussions between the client and lawyer with the assurance that communications and any advice given will be treated in strictest confidence and covered by LPP.

Legal advice can be contrasted to other advice as follows:

- Tax Agents are required under TASA to notify the TPB if they have reasonable grounds to believe that a significant breach of the Code of Professional Conduct has occurred by another Tax Agent.<sup>2</sup>
- Tax Agents will soon also be required to report clients that have made false or misleading statements to the ATO. For example, if a client back dates a document such as a trustee distribution resolution after 30 June and asks the Tax Agent to complete the tax returns on this basis.
- SMSF auditors are required to report an SMSF trustee to the ATO where they form the opinion that it is likely that a contravention of *Superannuation Industry (Supervision) Act 1993* (**SISA**) or the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SISR**) 'may

---

<sup>1</sup> *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 73 (Gleeson CJ, Gaudron and Gummow JJ) and 107 (Callinan J).

<sup>2</sup> TASA s 30-40.

*have occurred, may be occurring, or may occur* under s 129 of the SISA. ATO records confirm that contraventions generally occur in multiples rather than as one-off events. For example, in FY 2022, there were approximately 40,000 auditor contravention reports across 13,558 SMSFs (ie, around 2.95 per fund).

Accountants are also generally Tax Agents and therefore are likely to be covered by the TASA reporting obligations. Financial advisers may also be covered if they have a Tax Agents registration.

### **What advice is a lawyer authorised to provide?**

A client may seek advice that requires the expertise of a range of professionals including Tax Agents, accountants, financial advisers or lawyers. However, a person can only undertake legal work for reward if they are an Australian legal practitioner and the penalties for engaging in legal practice where an entity is unqualified are substantial.

The TASA gives authority to a Tax Agent to provide advice on Commonwealth taxation law,<sup>3</sup> but importantly does not cover State or Territory taxation laws such as stamp duty, land tax and payroll tax. Subject to the relevant State or Territory legislation, Tax Agents may be permitted to provide lodgement and advisory services, however, State or Territory tax advice may constitute legal advice, which should be provided by a lawyer in the relevant jurisdiction.

Importantly, lawyers have their own set obligations and expertise, separate to accountants, Tax Agents and other advisers, which may prove valuable to many individuals seeking advice. This broadly includes a lawyer's expertise in representing clients in tax disputes and contested matters, preparing and reviewing documents, as well as providing written advice that forms a reasonably arguable position (**RAP**).

### **Preparing a reasonably arguable position**

Preparation of a RAP can be essential for a client to minimise the risk of tax penalties in circumstances where something has gone wrong, eg, an omission of income or the lodgement of an incorrect claim. The ATO will take this into consideration when making a determination on the basis of whether the taxpayer took reasonable care or was reckless as to their conduct.

A matter will be 'reasonably arguable' if 'it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect'.<sup>4</sup> The ATO will only be satisfied that this threshold has been met if the taxpayer's position was at least reasonably arguable, persuasive and well supported by authorities.

The importance of seeking legal advice is demonstrated in *Re Sinclair and Federal Commissioner of Taxation*,<sup>5</sup> which concerned a taxpayer who claimed incorrect deductions. The Tribunal found that the taxpayer did not act with reasonable care by reason that he did not seek legal advice from a tax lawyer before claiming the deduction.<sup>6</sup> As such a significant penalty was imposed upon the taxpayer.

Given the considerable training, a lawyer has the knowledge and expertise to prepare a strong argument using legislation, case law, public rulings and more to place their client in the best possible position. Accordingly, lawyers with specialist tax knowledge, such as DBA Lawyers, should be engaged to provide advice for tax matters.

---

<sup>3</sup> TASA s 90-5

<sup>4</sup> *Tax Administration Act 1953* (Cth) sch 1 s 284-15.

<sup>5</sup> [2012] AATA 634.

<sup>6</sup> *Ibid* [93].

## Accountants, Tax Agents and lawyers working collaboratively

One thing that is sometimes overlooked, or indeed might be considered too late (or deep) in the assignment, is the opportunity for the client or their adviser to involve a lawyer so they can work collaboratively together and for the information to attract LPP. If managed properly with the lawyer instructing a third party such as an accountant, Tax Agent or valuer, the communications can be covered by LPP if they are for the dominant purpose of the lawyer having the necessary instructions to advise the client.<sup>7</sup> DBA Lawyers regularly work collaboratively with advisers when representing clients.

### Conclusion

Tax Agents should be aware of the new TASA reporting requirements and how they impact their relationship with their clients and other Tax Agents. Importantly, clients need to be aware that their adviser (if they are a Tax Agent) may soon be required to report them to the ATO. Instead, both advisers and clients should seek out qualified legal advice that is protected by LPP from lawyers who can advise on a range of tax and legal matters and are well suited to preparing a RAP in writing, supported by relevant authorities and evidence.

### Related articles:

- [What ATO publications can be relied on?](#)
- [SMSFs and voluntary disclosure to the ATO](#)
- [Seeking compensation for defective ATO administration](#)
- [PS LA 2020/3 — how the ATO applies administrative penalties on SMSF trustees/directors](#)
- [Penalties on SMSF trustees to increase substantially, so definitely time to change to a corporate trustee](#)

\* \* \*

This article is for general information only and should not be relied upon without first seeking advice from an appropriately qualified professional. The above does not constitute financial product advice. Financial product advice can only be obtained from a licenced financial adviser under the Corporations Act 2001 (Cth).

Note: DBA Lawyers presents monthly online SMSF training. For more details or to register, visit [www.dbanetwork.com.au](http://www.dbanetwork.com.au).

For more information regarding how DBA Lawyers can assist in your SMSF practice, visit [www.dbalawyers.com.au](http://www.dbalawyers.com.au).

*By Daniel Butler ([dbutler@dbalawyers.com.au](mailto:dbutler@dbalawyers.com.au)), Director, and Fraser Stead ([fstead@dbalawyers.com.au](mailto:fstead@dbalawyers.com.au)), Lawyer, DBA Lawyers.*

### DBA LAWYERS

14 August 2024.

---

<sup>7</sup> *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122

