

A CRITICAL COMPARISON OF TAX PRACTITIONER LEGISLATION BETWEEN SOUTH AFRICA AND AUSTRALIA

by

SAMANTHA MICHALETOS
Student number 21055671

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STUDY LEADER: Mrs H du Preez

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ABSTRACT

A CRITICAL COMPARISON OF TAX PRACTITIONER LEGISLATION BETWEEN SOUTH AFRICA AND AUSTRALIA

by

SAMANTHA MICHALETOS

SUPERVISOR: MRS H. DU PREEZ

DEPARTMENT: TAXATION

DEGREE: MAGISTER COMMERCII

Tax practitioners are highly influential in efforts to improve the overall tax compliance of taxpayers because of the significant role they play in the tax system. Although the concept of regulating tax practitioners has been much needed and is welcomed by business in South Africa, it is vitally important that clear guidelines and clarity are established in terms of who must register in terms of the Act; what qualifications/requirements must be met in order to qualify to apply for registration; and penalties and sanctions for non-registration/non-compliance on the part of the tax practitioner. Globalisation is increasing daily, as companies are trading more and more in the global arena, with many individuals working both locally and abroad. It is therefore important for South Africa's tax practitioners to be regulated to ensure that they are in line with tax practitioners globally. After comment from the public in respect of the first draft of the *Regulation of Tax Practitioners Bill*, a revised draft was published for comment in 2008. To date, no further amendments have been made, nor has the draft bill been submitted to the Parliamentary Committees for approval and finalisation. Australia has successfully implemented a new legislative regime in respect of the regulation of tax practitioners and has issued useful guidance notes on the legislation. This provides a good benchmark to measure the South African legislation against.

OPSOMMING

'N KRITIESE VERGELYKING VAN BELASTING PRAKTISYN WETGEWING TUSSEN SUID-AFRIKA en AUSTRALIë

deur

SAMANTHA MICHALETOS

STUDIELEIER: Mev H DU PREEZ

DEPARTEMENT: BELASTING

GRAAD: MAGISTER Commercii

Belasting praktisyne is hoogs invloedryke partye om die algehele belasting nakoming van belastingbetalers te verbeter, as gevolg van die belangrike rol wat hulle speel in die belasting sisteem. Hoewel die konsep van die regulering van belastingpraktisyne in Suid Afrika baie nodig is en verwelkom word deur besigheid, is dit uiters belangrik dat duidelike riglyne daar gestel word van wie moet registreer in terme van die Wet; watter kwalifikasies /vereistes nagekom moet word om te kwalifiseer om aansoek te kan doen vir registrasie; en boetes en sanksies kan gehef word vir die oortreding van die bogenoemde vereistes vir die belasting praktisyne. Globalisering is aan die toeneem op 'n daaglikse basis soos maatskappye al hoe meer op die internasionale speelveld handel, waar baie individue wat plaaslik en oorsee werk. Dit is dus belangrik dat Suid-Afrika se belasting praktisyne gereguleer word om te verseker dat hulle in ooreenstemming is met belasting praktisyne wêreldwyd. Na ontvangs van kommentaar van die publiek ten opsigte van die eerste konsep *Regulation of Tax Practitioners Bill*, 'n hersiene konsep was gepubliseer in 2008 vir kommentaar. Tot op hede was geen verdere veranderings gemaak nie en die wetsontwerp was nog nie ingedien by die Parlementêre Komitees vir goedkeuring en afhandeling nie. Australia het 'n nuwe wetgewing ten opsigte van die regulasies van belasting praktisyne suksesvol geïmplementeer en julle het hulpvaardige handleidings vir die wetgewing ook gepubliseer. Hierdie sal 'n goeie maatstaf wees om die Suid Afrikaanse wetgewing teen te meet.

A CRITICAL COMPARISON OF TAX PRACTITIONER LEGISLATION BETWEEN SOUTH AFRICA AND AUSTRALIA

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

Tax practitioners are highly influential in efforts to improve the overall tax compliance of taxpayers, because of the significant role they play in the tax systems of many countries who adopt the Organisation for Economic Co-operation and Development (OECD) model. According to the OECD, tax professionals prepare over thirty percent of personal income tax returns for about half its members, while among two thirds of its members fifty percent of corporate income tax returns are prepared by tax professionals (OECD, 2005:5).

It is therefore important for the South African regulations for tax practitioners to conform to those of developed countries.

In 2002, the South African Revenue Service (SARS) initiated discussions on the regulation of tax practitioners in South Africa (SA). Mr Trevor Manuel, the Minister of Finance at the time, stated that the regulation of tax consultants and advisors would be “in order to promote better compliance and ensure that the taxpayers receive advice consistent with tax legislation” (South African Revenue Service, not dated:2).

A discussion document entitled *Regulating Tax Practitioners* was released for public comment on 29 November 2002 (SARS, not dated.) and comments were to be received by SARS on or before 28 February 2003. After consideration of the comments, a number of refinements were made to the proposal.

The implementation of this regulation was divided into two phases, the first phase being the registration of tax practitioners with SARS, and the second being the establishment of an independent board for tax practitioners and the registration of tax practitioners with this board.

The first phase was brought into effect with the introduction of section 67A of the Income Tax Act 58 of 1962 (“the Act”), which sets down who should register as a tax practitioner and the date by which the tax consultant or advisor should register. In terms of the Draft Regulation Amendment Bill, the deadline for registration with SARS was 30 June 2005. This phase provided information on existing tax practitioners as far as it concerned their qualifications, experience and membership of existing professional bodies.

In 2008, almost 23 000 tax practitioners were registered with SARS (SARS, 2008). According to communication with SARS (2011), in 2011, this figure is approximately 27 000. However, according to SARS, this is not an accurate reflection, as there are individuals who are registered but should not be, and vice versa.

The second phase envisages the establishment of an independent regulatory board for tax practitioners in terms of a separate Bill. On 27 February 2007, a draft *Regulation of Tax Practitioners Bill* was published for comment, due by 5 April 2007.

This done, a revised draft bill was published for comment, due by 15 July 2008.

To date, no further amendments have been made, nor has the bill been submitted to the Parliamentary Committees for approval and finalisation.

1.2 PROBLEM STATEMENT

At present, there are many discrepancies and uncertainties in the draft bill regarding:

- who has to register (SAICA, 2008);
- what qualifications/ requirements must be fulfilled in order to register as a tax practitioner; and
- the composition of the board (SAIPA, 2007).

When it comes to their eligibility to register as tax practitioners, the effect of the new legislation on those who have already registered with SARS must also be considered.

1.3 PURPOSE STATEMENT

The purpose of this study is to critically compare the SA legislation regulating tax practitioners with the legislation in Australia.

1.4 RESEARCH OBJECTIVES

The objectives of this study are:

- To establish a theoretical framework for the study that can be used as a basis for critically comparing the legislation in SA with that in Australia, by means of a literature study;
- To critically compare the tax practitioner legislation in SA and Australia using the theoretical framework as a basis.

1.5 IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY

Although the concept of regulating tax practitioners in SA is much needed and welcomed by business in SA, it is vitally important for clear guidelines and clarity to be established in terms of:

- who must register in terms of section 67A of the Act;
- what qualifications/requirements must be met in order to qualify to apply for registration;
- inter alia, penalties and sanctions for non-registration/non-compliance on the part of the tax practitioner.

Globalisation is constantly increasing, as companies are trading more and more on a global playing field, and so many individuals are working not just locally but abroad as well. It is therefore important for SA's tax practitioners to be regulated to ensure that they are in line with tax practitioners globally. "With globalisation comes the increasing need for revenue authorities around the world to cooperate and help each country administer their revenue system" (OECD, 2004:4).

1.6 DELIMITATIONS AND ASSUMPTIONS

The study will be limited to a comparison of SA legislation with that of Australia. The motivation for this is that Australia has successfully implemented a new legislative regime in respect of the regulation of tax practitioners and has issued useful guidance notes on the legislation. In 2006, more than seventy four percent of individuals and ninety five percent of companies used tax professionals to prepare their income tax returns (Australian Tax Authority, 2007).

Although other developed countries, such as the United Kingdom and the United States of America, also have legislation governing tax practitioners, this is an exploratory study and the purpose is not to generalise and make international comparisons.

The study will not determine the implications of tax practitioners providing cross-border services.

The study will deal with the Draft Bill which was open for public comment in 2008. The review will take into account the comments of various organisations as well as the legislation regulating tax practitioners in Australia. As stated above, this is on account of the successful implementation of that country's new legislative regime in respect of tax practitioners.

The document will be divided into the same sections as in the Draft Bill, and comments and comparisons will be made in and at the end of each section, while recommendations will be set out in the conclusion.

1.7 DEFINITION OF KEY TERMS

The definitions of key terms in this document are set out below:

Board: The Independent Regulatory Board for tax practitioners established in terms of section 4 of the draft bill (Section 1 of the draft bill, 2008).

Commissioner: The Commissioner for the SARS (Section 1 of the draft bill, 2008).

Draft Bill: The revised draft Regulation of Tax Practitioners Bill, 2008.

Minister: The Minister of Finance (Section 1 of the draft bill, 2008).

Practice: In relation to a registered tax practitioner this means the provision of services contemplated in section 23 of the draft bill (Section 1 of the draft bill, 2008).

Registered tax practitioner: A natural person registered with the Board in terms of section 26 of the draft bill (Section 1 of the draft bill, 2008).

The abbreviations below are used in the body of the text in this document.

Table 1: Abbreviations used in this document

Abbreviation	Meaning
ATO	Australian Tax Authority
IRBA	Independent Regulatory Board for Auditors
ITPB	Independent Tax Practitioner Board
OECD	Organisation for Economic Co-operation and Development
SA	South Africa
SAICA	The South African Institute of Chartered Accountants
SAIPA	The South African Institute of Professional Accountants
SAIT	The South African Institute of Tax Practitioners
SARS	The South African Revenue Service
The Draft Bill	Revised Draft Regulation of Tax Practitioners Bill

1.8 CHAPTER OVERVIEW

The mini-dissertation consists of the following chapters:

- Chapter 1 – Introduction
- Chapter 2 – The legislation

- Chapter 3 – Tax practitioners
- Chapter 4 – Conclusion
- List of references

Chapter 1 sets out the background to the study. This includes the purpose, objectives and importance of the study. In addition, the limitations of the study are discussed.

Chapters 2 and 3 provide a review of the legislation pertaining to the regulation of tax practitioners in SA and Australia.

Chapter 4 provides a summary of the findings as well as the conclusion to the study. The purpose of this chapter is to review the literature relevant to the study.

CHAPTER 2: LEGISLATION

This chapter will consider the purpose of the legislation as well as the Independent Board for Tax Practitioners. A comparison between South African and Australian legislation with comment on the similarities and differences between the two countries' legislation.

2.1 PURPOSE AND APPLICATION OF THE LEGISLATION

2.1.1 Purpose of the legislation

Section 2 of the Draft Bill states: "The purpose of this Act is to regulate the tax profession to ensure that tax practitioners are appropriately qualified, have the necessary experience, adhere to ethical practices and are held accountable for their professional conduct."

Taxpayers engage tax practitioners for advice and assistance with the preparation of their income tax returns to ensure that what they submit to the revenue authorities is correct and accurate (SARS, 2006:6). The majority of taxpayers prefer more conservative advice to ensure that they are fully compliant with the tax laws (SARS, 2006:6). The South African Institute of Chartered Accountants (SAICA) is of the opinion that, in ensuring the competence of tax practitioners and the quality of advice they provide, public interest will be best served (SAICA, 2008:2).

In a tax system where tax practitioners are not regulated, market forces are the only way of ensuring tax practitioners' competence (SARS, 2002:4). The problem with this is that, unless the tax practitioner is registered with a professional body such as SAICA or the Independent Regulatory Board for Auditors (IRBA), there is no recourse for the taxpayer, as the tax practitioner is not being held accountable by a regulatory body.

The purpose of regulating tax practitioners is for the protection of taxpayers, to ensure effective and efficient tax collection (SAICA, 2008:2) and to equalise matters between tax practitioners who are less aggressive in their advice and others who have an unfair advantage because of their aggressive attitudes (SARS, 2006:9).

In a study conducted by the OECD, it was noted that the principal benefit for revenue authorities derived from the regulation of tax practitioners was that they could gain insight into the following (OECD, 2008:44):

- how tax practitioners go about their business;
- what drives tax practitioners' business; and
- the impact of tax practitioners on decisions made by their clients in relation to tax compliance.

In order to mitigate the risks taken by tax practitioners who develop or promote aggressive tax planning, strategies recommended by the study include:

- the registration and regulation of tax practitioners;
- advance disclosure of schemes or arrangements;
- restrictions in terms of compliance agreements;
- penalties and other non-monetary sanctions, such as suspension or disbarment from practice (OECD, 2008:18-20).

The objective of the Tax Agents Services Act 2009 is to ensure that the appropriate standards of professional and ethical conduct are adhered to (Australia, 2009:4). The priorities on which the Australian Tax Authority focuses include:

- the improvement of services provided to tax practitioners;
- building relationships with tax practitioners;
- identifying compliance risk and deterring fraud and tax evasion;
- taking firm action against tax practitioners whose conduct is unprofessional (SARS, 2006:10).

In theory, tax practitioners pose a lower risk and require less qualitative intervention from the revenue authorities (SARS, 2006:5). Further advantages to the regulation of tax practitioners include:

- administrative efficiencies;
- improvement in the integrity of the tax system;
- the assurance of minimum standards to which tax practitioners must adhere;

- the opportunity for taxpayers to challenge the unprofessional conduct of tax practitioners in a cost effective way; and
- dedicated revenue resources for tax practitioners (SARS, 2002:3).

At present there are no minimum standards in respect of qualifications or experience to which SA tax practitioners must adhere. In addition, not all SA tax practitioners are subject to a code of conduct (SARS, 2002:2).

Therefore, to accord with international standards, it is important for SA tax practitioners to be regulated.

2.1.2 Application of the legislation

Section 3(1) of the Draft Bill refers to an individual who is required to register with the Board in terms of section 23, while section 23 requires natural persons to register as tax practitioners.

The current draft legislation refers to any natural person as well as to an individual. This is currently causing confusion as to who should register as a tax practitioner. SARS should therefore clarify whether this Act applies to any natural person or individual.

The Tax Agents Services Act 2009 refers to a “fit and proper person”, and specifies the different criteria for eligibility for registration as a registered tax agent for individuals, partnerships and companies (Australia, 2009:7-9).

Section 3(2) of the SA Draft Bill states: “Subject to sections 25(2), 27 and 31, Parts II, III and IV of Chapter V do not apply to a registered tax practitioner who –

- (a) is registered with the Independent Regulatory Board for Auditors established in terms of section 3 of the Auditing Professions Act, 2005 (Act No. 26 of 2005);
- (b) is a person who is admitted and enrolled as an attorney, notary or conveyancer by the court in terms of sections 15, 17 or 18 of the Attorneys Act, 1979 (Act No. 53 of 1979);
- (c) is a person who is admitted and authorised to practice and is enrolled as an advocate on the role of advocates in terms of the Admissions of Advocates Act, 1964 (Act No. 74 of 1964; or

(d) is a person whose profession is regulated by law by a statutory body with which the Minister is satisfied and is similar to the bodies and professions in this subsection and the details of which are published in the *Government Gazette*.”

This section exempts tax practitioners who are already subject to codes of conduct and disciplinary procedures as a result of their registration with a particular regulatory body. It ensures that tax practitioners are charged by only one professional body and do not face disciplinary proceedings by both (SAICA, 2007:6-7).

In terms of Australian legislation, it appears that all registered tax agents are subject to the disciplinary procedures of the Tax Board. Australia does not distinguish between tax agents who are already subject to codes of conduct of other regulatory boards (Australia, 2009:2).

The Australian legislation has been amended to do away with the different state Boards and establish a single, national Tax Practitioner Board. Reasons for this include the increased risk of inconsistencies in the regulation and standards of tax practitioners among the various Boards (Australia, 2007:1).

It would therefore appear that the SA legislation is ahead on this point, as it provides more than one avenue to hold a registered tax practitioner accountable. However, it should be pointed out that should this exemption remain as it is, there may be a risk of inconsistency in the way the different regulatory bodies approach and apply the disciplinary procedures. For example, the regulatory body may deem that an act by a tax practitioner does not require disciplinary action while the Tax Practitioner Board may disbar a member for the same act.

Should the tax practitioners' professional body find a tax practitioner guilty of misconduct and withdraw the practitioner's membership, the Board should be able to take the same course of action.

2.2 INDEPENDENT REGULATORY BOARD FOR TAX PRACTITIONERS

2.2.1 Establishment of the Board

Section 4 of the Draft Bill provides for the establishment of a professional body for tax practitioners. This is a juristic person and will be known as the Independent Regulatory Body for Tax Practitioners. Section 4 provides the Board with the authority to exercise its objectives and powers as set out in the Act, but also subjects it to the Constitution of the Republic of South Africa as well as the Public Finance Management Act.

In Australia, the Tax Agents Services Bill of 2007 abolishes the six state-based boards and establishes a single, national body called the Tax Practitioners Board (Lateline Business, 2010). This will ensure that the regulation of tax practitioners in Australia is consistent nationally and that resource allocation will be flexible (Australia, 2007).

According to Dale Boucher, Chairman of the Australian Tax Practitioners Board, one of the Board's most important tasks is to raise the level of professionalism and the conduct of tax practitioners (Lateline Business, 2010).

In its submission of comments to SARS, the South Africa Institute of Tax Practitioners (SAIT) notes that the Board established by the Draft Bill is similar to IRBA and creates a double layer, as members of IRBA and the Independent Tax Practitioner Board (ITPB) will be regulated by different bodies. This means that possible duplication with regard to, inter alia, registration, continued professional development and education may occur (SAIT, 2008:2-3). They also recommend an alternative model for regulating tax practitioners. SAIT suggests that the existing infrastructure of professional bodies, such as a self-regulated "Standing Committee for Tax Practitioners", be used. This body would be low-cost and should be able to accredit professional bodies, for example SAICA (SAIT, 2008:3).

In terms of Australian legislation, the Board is independent in respect of decision-making, but it relies on the tax office for administrative support (Australia, 2009:4).

This should possibly be explored when it comes to the operation of the SA Board.

2.2.2 Objectives of the Board

In Section 5 of the Draft Bill, the objectives of the Board are set out. These objectives are “to -

- a) ensure that clear and appropriate requirements exist with which a person must comply to be registered as a registered tax practitioner;
- b) set requirements for the maintenance and development of professional competence for registered tax practitioners; and
- c) promote the integrity of the tax practitioner profession.”

According to SAICA (2007:2), the first objective of the Board is very wide and provides no protection for the tax practitioner.

However, the Australian legislation merely indicates that one of the Board’s functions is to administer the system for the registration of tax practitioners (Australia, 2009:5). The specific requirements for registration as a tax practitioner are dealt with in later sections of the legislation.

If the integrity of the profession of tax practitioner is to be promoted, a code of conduct against which tax practitioners’ performance could be assessed would have to be established (OECD, 2005:7). The Tax Agent Services Act 2009 makes legal a code that sets out required standards with regard to professionalism and ethicality of registered tax practitioners. The code includes 14 core principals which are organised into five categories. These categories are (Australia, 2009:1):

- Honesty and integrity;
- Independence;
- Confidentiality;
- Competence;
- Other responsibilities;

The Australian Tax Practitioners Board has published an information sheet explaining each of the 14 core principals in detail.

Further, the Australian legislation also states that it is the Board's function to issue guidelines in respect of the system regarding the registration of tax practitioners, investigation and disciplinary actions (Australia, 2009:38).

2.2.3 Powers of the Board

The Draft Bill sets out what the Board must do in order its objectives to be achieved. The 16 objectives are discussed below:

Objective 1

The Board must “prescribe the standards of professional qualifications for the different categories of tax practitioners” (Section 6(a)).

This gives the Board the power to set the requirements for the qualifications for registered tax practitioners. They must thus distinguish between different categories of tax practitioners.

There is no reference to the number of categories or to what differentiates them from one another. It is therefore not clear whether the Board should be responsible for defining what these categories are and how they should be made up.

In its submission of comments on the first draft, SAICA suggested that the Board receive guidance on the different categories of tax practitioners (SAICA, 2007:2). The different categories of tax practitioners should be legislated and the Board should merely enforce the legislation. It was also suggested that minimum requirements pertaining to training and education as well as the Continued Professional Education requirements be set out in the legislation (SAICA, 2008:3).

Objective 2

The Board must “ensure that the standards of professional qualifications, competence, ethics and services of registered tax practitioners are maintained” (Section 6(b)).

It appears that SARS is attempting to evade responsibility for making decisions on the regulation of South African tax practitioners, instead of simply enforcing the regulations. It appears that the Board is now expected to take on the role of both legislator and enforcer.

Objective 3

The Board must “establish and maintain a registration system and register for registered tax practitioners which provide for different categories of registered tax practitioners and different practices within the different categories” (Section 6(c)).

The Australian legislation on the regulation of tax practitioners includes the same duty for the Board when it comes to a registration system for tax practitioners.

In the explanatory memorandum on the Australian legislation, the details that should be contained in the register are set out. These are (Australia, 2007:11):

- the name of the entity;
- the contact details of the business of the entity;
- any relevant professional affiliation of the entity; and
- any sanction (other than a caution) that has been imposed by the Board on the entity.

A suggestion would be to include in the legislation the details that would have to be included on the register. This would provide guidance for the Board and would ensure that the minimum was required.

Objective 4

The Board must “ensure that the register is at all reasonable times open for inspection by any member of the public” (Section 6(d)).

This is a reasonable duty and will also be a valuable resource for taxpayers who would like to engage a tax practitioner to assist with their tax affairs (Australia, 2007:11).

In terms of the Australian legislation, the register must be available on the internet. It would be advantageous if the SA register was also available on the internet, which would ensure its availability for inspection by the public at all times. Should this be implemented, the Board would have to ensure that the register published on the internet was updated regularly.

Objective 5

The Board must “take any steps necessary to promote the integrity of the tax practitioner profession” (Section 6(e)).

The legislation gives the Board guidance on how to comply with this requirement.

First, it requires the Board to prescribe what constitutes improper conduct, the manner in which an allegation should be investigated as well as the punishment if the tax practitioner is found guilty of misconduct.

As previously discussed, the code of conduct should be legislated (SAICA, 2008:3) and the Board should merely enforce it. The code of conduct would therefore prescribe what constituted improper conduct by a tax practitioner. The Board’s duty should therefore be to decide the manner in which the allegation of improper conduct was investigated as well as the punishment should the tax practitioner be found guilty. It has also been suggested to SARS that minimum requirements in respect of disciplinary procedures be enacted (SAICA, 2008:3).

Second, the Board should publish the name of any tax practitioner who is investigated as well as the outcome of any hearing and the consequent punishment (if any) for his/her conduct. This provision seems somewhat severe, as there is an assumption that the tax practitioner will be found guilty. In contrast, the Australian legislation requires only that the details of tax practitioners whose registration has been terminated on conviction be published. It also provides that these details should remain on the register for only twelve months from the date on which the registration was terminated.

It is suggested that the names of only those tax practitioners who have, in fact, been convicted of improper conduct should be published (SAIT, 2008:4), because, to publish the names of all tax practitioners under investigation, regardless of whether or not they are innocent, could ruin their businesses .

Third, the Board has been given the power to make an application to any court of competent jurisdiction for an order prohibiting any person who is not registered as a tax practitioner from acting as such.

This is an acceptable provision, and will enable the Board to ensure compliance with the regulations.

Lastly, the Board is required to compile and publish a code of professional conduct and take necessary action to ensure compliance with this.

As previously pointed out, the Australian legislation sets out the code of conduct, and the Australian Tax Practitioners' Board merely ensures compliance with the code of conduct.

The SA legislation should also set out the code of conduct to be in line with international trends.

Objective 6

The Board must prescribe fees and charges (Section 6(f)).

The Board is required to prescribe the registration fees, annual fees and charges for any services or goods they provide to tax practitioners. The legislation also states that there should be a distinction in fees according to the different categories of tax practitioners. The legislation does not give any indication of what the fees or levies would amount to and these should be published (SAICA, 2007:2), as stated in the Australian legislation (Australia, 2007). This would also ensure that the Board's fees would be reasonable. The legislation should take into account that there would be either an exemption, in respect of the registration and annual fees, or a reduced fee for tax practitioners who are already members of accredited professional bodies. As such fees are already high, these tax practitioners should be exempt from paying the fees legislated in this Act (SAICA, 2008:6).

The types of services that could be provided for registered tax practitioners should be established, as should whether these services should, in fact, carry a charge. Depending on the amount of the registration and annual fees, it should be considered whether the Board should provide these additional services in return for part of the fees paid by the tax practitioners.

Objective 7

The Board must “participate in the activities of bodies...” (Section 6(g)).

These bodies include:

- Bodies registered under the South African Qualifications Authority Act, 1995 (Act No.58 of 1995), which are responsible for establishing education and training standards or qualifications for the tax practitioner profession;
- Bodies accredited under that Act which are responsible for monitoring registered tax practitioner achievements in respect of the standards or qualifications required;
- Bodies whose main purpose is the development and setting of registered tax practitioner standards, both national and international.

It seems that this section contradicts subsection (a), as the Board is required to prescribe the qualifications and standards required by registered tax practitioners. The role of these various bodies when it comes to the qualifications and standards required from registered tax practitioners should be clarified.

Objective 8

The Board must “employ persons to assist it in the performance of its functions” (Section 6(h)).

This merely gives the Board the power to employ staff to ensure that its functions run smoothly.

Objective 9

The Board must “hire, purchase or otherwise acquire movable or immovable property for the effective performance of its functions, and let, sell or otherwise dispose of such property” (Section 6(i)).

It is both understandable and reasonable that the Board should need to purchase movable property, such as vehicles for their drivers. However, the Board also has the power to purchase and sell immovable property, for instance, buildings.

This ought to be clarified, as the Board should not need to purchase or sell immovable property (SAIT, 2008:4).

Objective 10

The Board must “borrow or raise money in accordance with the Public Finance Management Act” (Section 6(j)).

This ensures that the Board complies with the rules set out for government departments in respect of their finances.

Objective 11

The Board must “invest its funds in a manner it deems fit” (Section 6(k)).

This gives the Board the power to use its funds to their own advantage.

However, this should be carefully monitored by independent parties, to ensure that the funds are not misallocated.

Objective 12

The Board must “publish a journal and issue newsletters and circulars or any other publication containing information and guidelines relating to the tax practitioner profession” (Section 6(l)).

This accords with the Australian legislation, which also provides that it is the Board’s duty to issue guidelines to ensure that all tax practitioners understand the legislation and functioning of the Board and its procedures.

Objective 13

The Board must “encourage and, in appropriate circumstances, finance education in connection with, and research into any matter affecting the tax practitioner profession” (Section 6(m)).

This is a reasonable section, and provides a platform for research into matters which are of concern to registered tax practitioners.

Objective 14

The Board must “formally or informally co-operate with or assist an organisation with similar objectives, whether inside or outside the Republic” (Section 6(n)).

The type of assistance required should be clarified. For example, information pertaining to taxpayers should not be given to other organisations.

Should other organisations require assistance with day-to-day functions of the Board, it is agreed that the Board should co-operate.

Objective 15

The Board must “prescribe the period within which accreditation with the Board must be renewed” (Section 6(o)).

There should be a guideline from SARS to ensure that the time period allowed is not unreasonable.

Objective 16

The Board must “do anything which is reasonable or necessary to achieve its objectives” (Section 6(p)).

This is in line with international trends, as the Australian legislation also includes this in the powers allowed the Tax Practitioner Board.

The actions by the Board should be closely monitored to ensure that they do not constitute improper conduct.

2.2.4 Composition of the Board

In terms of the Draft Bill, the Board will consist of seven principal members. These members will be appointed by the Minister, they must be “fit and proper” and have the appropriate qualifications and necessary experience. In appointing the Board members, the Minister must take into account the demographics of the SA population, any nominations received, and the availability of the individuals to serve on the Board.

The requisite qualities of a “fit and proper” person should be stated clearly in the legislation, perhaps by prescribing the specific requirements to be met if the person is to qualify.

Before any appointments are made, the Minister must invite nominations by publishing the invitation in the *Gazette* and any national newspaper.

Of the seven members, at least three must be registered tax practitioners, while one may be a SARS representative. The SARS representative will have no voting rights, nor will he/she sit on any disciplinary or investigation committees, but will merely be an observer (Moneywebtax, 2008). The chairperson and deputy chairperson will be selected by the Board from the principal members. No mention is made of how the three remaining members of the board will be chosen.

The Board may also invite one or more suitable candidates to serve in an advisory capacity. They will participate in all proceedings of the Board, other than voting.

In a submission of comments on the Draft Bill, it was suggested that the Board consist of nine or eleven members to ensure equality of votes (SAICA, 2007:3). It was also suggested that the majority of members be accredited tax practitioners, which would demonstrate the appropriate commitment and appreciation of issues raised. It appears that SARS has taken this comment to heart and has implemented a constituency that will result in fairness and equality.

The Australian Board consists of at least seven members, one of whom is the chairperson, who is chosen by the Minister. The vacancy for a Board member is advertised and nominations from other parties are also taken into account. In addition, the Minister may appoint a community representative or a person with special qualifications or experience (Australia, 2007).

Australian Tax Office employees may hold Board membership (apart from the chairperson), but it would be unusual for more than two Tax Office officials to be appointed at any one time.

The two Boards appear to have a similar constituency, which accords with international trends.

The Australian legislation distinguishes between full-time and part-time Board members, while the South African legislation is not clear on whether the appointment is for a full-time or part-time position. This should be clarified in the legislation.

The Draft Bill also allows for alternate members for any principal member. This alternate member may only attend Board meetings in the absence of the principal member and is entitled to participate and vote in all the proceedings. This alternate member must be a registered tax practitioner. The appointment of the alternate members is the same as for the appointment of the principal members.

The appointment of a member of the Board is valid for a maximum period of three years. Once this period has expired, a member may be reappointed but may not serve on the Board for more than two consecutive terms. This is in accordance with the Australian regulations (Australia, 2007:7; News.com, 2009), as the Australian Board members are eligible for reappointment on expiry of their term. This will ensure continuity of the Board (SAICA, 2007:3).

In terms of section 11, a member will be disqualified "...if that person:

- (a) has at any time been removed from an office of trust on account of misconduct;
- (b) has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, corruption, money-laundering, forgery (including uttering a forged document), perjury or any other offence which involves dishonesty, in respect of which that person has been sentenced to imprisonment without the option of a fine or to a fine exceeding an amount determined from time to time by the Minister for this purpose;
- (c) is an unrehabilitated insolvent;
- (d) is for the time being declared by a competent court to be of unsound mind or unable to manage his or her own affairs;
- (e) has in terms of this Act been found guilty of improper conduct; or
- (f) is not permanently resident in the Republic."

The above criteria for disqualification ensure that the members of the Board will be competent to carry out the duties of their appointment.

In addition to similar provisions, the Australian Board members may also be disqualified if, in the case of a full-time Board member, the member is engaged in paid employment outside the duties of his/her office or, in the case of a part-time Board member, that member is engaged in employment that conflicts with his/ her duties (Australia, 2009:42).

It appears that the disqualification criteria set out in the SA legislation accord with those of the Australian legislation.

A Board member's appointment terminates if:

- the period of appointment expires;
- the member resigns;
- the member becomes disqualified;
- the Minister terminates the appointment on grounds of misconduct, incapacity or incompetence; or
- the member has been absent without leave from two consecutive Board meetings.

The above is also in line with the Australian legislation, although a distinction is made between full-time and part-time appointments in respect of the termination criteria.

2.2.5 Procedural matters relating to meetings and Board decisions

In terms of the Draft legislation, the Board is required to meet at least twice a year, but may meet more often if deemed necessary. The meeting will be held at a time and place determined by the Board and, should a special meeting be convened by the chairperson, the time and date will be determined by the chairperson.

Should the chairperson receive a request to convene a special meeting, he/she must so act within 21 days of receiving the request.

This request must be in writing and signed by at least three of the principal members of the Board.

In respect of the procedure at the Board meetings, the legislation provides that the Board must determine the rules for the conduct of its own and its committees meetings. Each Board member, excluding the SARS official, will have one vote. Should there be an equal vote, the chairperson has a second vote (casting vote) to decide on the matter to hand.

This accords with the Australian legislation, as the Australian Board may regulate the proceedings at its meetings in any way it sees fit, and the person presiding at a meeting has a casting vote (Australia, 2007:9).

The presence of the majority of the Board members who are entitled to vote at a meeting will be a quorum, and the Board may decide on a matter if the number of members present constitutes a quorum and is supported by the majority of the members present at the meeting.

This is also in line with the Australian legislation, where the majority of the members present at a meeting must agree for a decision to be made.

2.2.6 Funds, financial management and payment to members

In terms of section 16(1) of the Draft Bill, “the funds of the Board consist of -

- Fees and monies levied under this Act;
- Any funds appropriated for the purpose by Parliament;
- Any donations or grants; and
- Any payments for goods or services supplied.”

The legislation prescribes that all monies received by the Board must be paid into one or more accounts, which must be kept at one or more registered financial institutions.

The Draft Bill also states that the financial management and submission of financial statements and the annual report must be in accordance with the Public Finance Management Act.

With regard to remuneration, the Board must, in consultation with the Minister, determine the remuneration and allowances payable to the principal members, alternate members and members of its committees.

In terms of the Australian legislation, the determination of remuneration and allowances to be paid to Board members must be made by the Remuneration Tribunal, which is an independent statutory body responsible for determining remuneration and related matters for a range of senior officers in Commonwealth bodies. The Remuneration Tribunal is governed by the Remuneration Tribunal Act 1973.

The remuneration for the SA Board members should be determined independently and not by the Board or the Minister. This was suggested to SARS in their call for comment on the latest Draft Bill (SAICA, 2008:7).

2.2.7 Establishment of committees

The current Draft Bill enables the Board to establish committees to assist in the performance of its duties. It may also dissolve or reconstitute any such committee. It does, however, prescribe that the board establish the following permanent committees:

- Investigating committee;
- Disciplinary committee;
- Education committee;
- Ethics committee.

A committee can consist of as many members as the Board deems necessary, and these members may be appointed from outside the ranks of the Board and tax practitioner profession. However, it is prescribed that members of the investigating and disciplinary committees must have significant legal experience and the disciplinary committee must be chaired by a retired judge or a senior advocate.

The Board may assign any of its powers to its committees and may also amend or withdraw any power so assigned. The Board may also confirm, vary or revoke any decision made by the committee. In addition, it is also the Board's responsibility to provide the necessary funding to its committees.

The Australian legislation also enables the Board to establish committees to assist the Board in performing its functions and the Board may appoint any person they deem fit. The legislation does not dictate which committees should be formed, rather leaving this to the discretion of the Board.

In this instance, it appears that the SA legislation is ahead of international trends, as guidance is provided in terms of which committees should be formed and which will assist in focused outcomes in these particular areas. These committees will also have members who specialise in a particular area, which will ensure that the final outcome will be relevant and useful.

2.3 REPORTS TO MINISTER

Section 22 of the Draft Bill requires that the Board submit a report on its affairs and functions within six months after its financial year end. Included in the report must be a copy of the audited financial statements in respect of that financial year, a list of registered tax practitioners on the last day of the financial year and an overview of the achievements and activities of the committees and the Board in respect of that financial year.

The chairperson is also required to submit intermittent reports in respect of the Board's activities which he/she feels should be brought to the Minister's attention.

Should any three or more of the Board members be dissatisfied with a decision taken by the Board, they may communicate this to the Minister with reasons for their dissent. In this situation, the Minister may require the Board to furnish him with its observations in this regard together with any information he may deem necessary.

The Board is also required to furnish the Minister or any person in the service of the state with advice on any questions in connection with the tax practitioner profession or similar matters, and must, in the course of its duties, also communicate any information required in respect of matters that are regarded as being of public importance to the Minister.

In terms of this legislation, the Minister is obliged to table copies of every report it receives from the Board in Parliament within 14 days after receipt if Parliament is in session. If Parliament is not in session, the Minister will have 14 days after the commencement of Parliament to table the report.

The Australian legislation prescribes that the chairperson of the Australian Board must prepare a report on its operations and give it to the Minister for presentation to Parliament as soon after the financial year end as is practical.

In comparison with the Australian legislation, the SA Board has a deadline by which they must furnish the Minister with the annual report. This will ensure that any issues which are of concern can be cleared up and any actions which need to be taken to correct any concerns will be done within a reasonable period.

2.4 CONCLUSION

Chapter 2 has discussed the application of the Draft Bill as well as the Independent Regulatory Board for tax practitioners.

While there are many similarities between the SA draft legislation and the Australian legislation, there remain gaps that need to be addressed. Of these gaps, one of the most important is the code of conduct to which the SA tax practitioners must abide. Including this function in the SA legislation as one of the SA Board's objectives should be considered.

Chapter 3 will deal with the draft legislation regulating tax practitioners. This will include the registration and deregistration of tax practitioners, the duties of tax practitioners, and disciplinary and miscellaneous matters.

CHAPTER 3: TAX PRACTITIONERS

As in Chapter 2, a comparison will be drawn between the SA draft legislation and the Australian legislation. Comments on the similarities and differences will be made in this chapter.

3.1 REGISTRATION OF TAX PRACTITIONERS AND REMOVAL FROM REGISTER

3.1.1 Registration

Currently, Section 67A of the Act prescribes the requirements in respect of the registration of a tax practitioner in SA. Section 23 of the Draft Bill requires every natural person who provides advice to any other person on the application of any Act administered by the Commissioner, or completes or assists in completing any document to be submitted to the Commissioner by any other person in terms of any such Act to register with the Commissioner as a tax practitioner with the Board.

The wording of this section contradicts section 3 of the Draft Bill, which provides that this Act applies to every individual who is required to register as a tax practitioner in terms of section 23. It should be clarified whether only individuals are entitled to register as tax practitioners or whether other entities, such as partnerships and companies, are also entitled to register as tax practitioners.

It has been suggested that partnerships be entitled to register as tax practitioners, as the partners are jointly and severally liable, and that ultimately it is the firm, not the individual partner, who is responsible for the advice given to taxpayers (SAICA, 2008:6). A similar argument can be made for companies providing tax practitioner services.

It is also necessary that the word “advice” be defined and that it caters for direct and indirect advice (SAICA, 2008:7).

In Australia, a person must be registered with the Tax Practitioners Board to be able to provide tax practitioner services for a fee. A person is eligible to register as a tax

practitioner if they are a fit and proper person and have the appropriate qualifications (Australia, 2009:7).

The Australian legislation enables individuals, partnerships and companies to register as tax practitioners and distinguishes between the different requirements for each of these to be eligible to register as a tax practitioner.

Therefore, to be in line with international trends, the SA legislation needs to make provision for the registration of partnerships and companies as tax practitioners and set out criteria to make them eligible to register.

Certain persons are exempt from registering as tax practitioners in terms of section 23 (2) of the Draft Bill. This exemption applies to any natural person who:

- “a) provides advice or completes or assists in completing any document, as contemplated in subsection (1), to that person for no consideration;
- b) provides advice contemplated in subsection (1) solely as an incidental or subordinate part of providing goods or other services to another person for which advice no consideration or fee is charged;
- c) provides advice or completes or assists in completing any document, as contemplated in subsection (1) solely –
 - i) to or in respect of the employer by whom that person is employed on a full-time basis, or to or in respect of that employer and connected persons in relation to that employer; or
 - ii) under the direct supervision of any person who is registered as a tax practitioner in terms of subsection (1); or
- d) is a licensed clearing agent referred to in section 64B of the Customs and Excise Act, 1964 (Act No.91 of 1964), or is otherwise licensed or registered in terms of that Act.”

Section 23(1)(a) of the Draft Bill provides that this registration applies to persons who provide advice with respect to *any* Act administered by SARS. It therefore makes no sense

that persons who advise clients with respect to the Customs & Excise Act are exempt from this section. The Oversight Board should surely regulate *all* taxes administered by SARS.

In many instances, the Value Added Tax (VAT) and the Customs & Excise Acts work hand-in-hand. If persons advising clients on the provisions of the VAT Act are required to register as tax practitioners, persons advising on the provisions of the Customs and Excise Act should also register as tax practitioners.

In addition, persons who provide tax practitioner services which are incidental or are a subordinate part of providing the goods or services to the individual should be considered more closely. This could refer to insurance brokers or financial consultants at banks or financial institutions who provide tax advice. This type of advice is more risky, as the individuals dispensing it are generally not adequately qualified to do so (SAICA, 2008:4-5). These individuals should therefore also be required to register as tax practitioners. This would ensure that taxpayers obtain advice that is correct and reduces the risk to them.

Exemption for persons involved purely in litigation matters should be re-considered, as this could result in individuals having to register as tax practitioners even if they are only to appear in one tax case (SAICA, 2008:7). This places an administrative burden on litigators as well as the Board, who could be inundated with applications.

As soon as a person starts practising as a tax practitioner, they have 30 days in which to apply for registration with the Board as a tax practitioner. The application must be in the prescribed form and must be accompanied by the prescribed application fee.

Once the application has been received by the Board, the latter must approve the application if it meets the necessary requirements. These requirements are (section 25(1)):

- “Complies with the appropriate standards of qualifications and experience for registered tax practitioners determined by the Board;
- Will comply with the code of professional conduct for registered tax practitioners determined by the Board;
- Is a fit and proper person;
- Is ordinarily resident in the Republic;

- Is not disqualified from registration under any of the provisions of subsection (2); and
- Meets any other requirements determined by the Board from time to time.”

The standard of qualification and experience should not be left to the Board to determine. As previously discussed, the legislation should provide guidance in this regard.

In terms of the second and third requirements, these are somewhat subjective and could lead to applications being unfairly dismissed.

Australia has made legal a test on whether a person is “fit and proper”, which includes objective tests like whether or not the person has been bankrupt in the five years prior to registering as a tax practitioner. It should be considered whether objective tests for these two requirements be set out in the South African legislation to ensure consistency in the granting of applications (SAICA, 2008:7).

The last requirement is very broad and may be subject to abuse and cause unfair dismissal of applications. It is suggested that this be removed and specific requirements be legislated in its place.

Finally, a transitional arrangement has been prescribed in respect of tax practitioners who were already registered as tax practitioners in terms of section 67A of the Act. There are, however, requirements for this transition and the registration is regarded as temporary and is limited to one year from the date of commencement of the Act. These requirements are set out in section 25 (3) of the Draft Bill and require the tax practitioner to have been registered as such already and the tax practitioner to have or carried on the profession of a tax practitioner for at least three years prior to the expiry of the temporary registration period, or to have done so already.

This seems slightly unreasonable; as tax practitioners who genuinely should be registered in terms of the legislation may fall outside of the net if they have only recently started practising and do not meet the three-year criterion. This provision should be reconsidered and a more reasonable transition implemented.

Once the Board has approved the application, the tax practitioner's name must be entered in the register and the Board must issue the applicant with a certificate of registration.

In terms of the Australian legislation, the Board has six months from receiving the application to decide on the application. Should the board not decide on the application within six months, it should be taken that it has been rejected.

The SA legislation does not provide a time frame within which an application must be decided on, but it is suggested that one be legislated. A period of six months seems somewhat drawn out, and a suggestion would be that the Board should have between 30 and 90 days to decide on an application. This would ensure that persons wanting to act as tax practitioners could do so without having to wait for unreasonable periods of time before being able to do so.

The Australian legislation also provides that the Board must determine the period for which a registration is valid, the minimum being three years.

This should also be considered in the SA legislation and the minimum period set at three years.

In addition, the Australian legislation provides for the renewal of registrations, which has not been considered in the South African legislation.

3.1.2 Withdrawal of approval and removal from register

In terms of the Draft Bill, the Board must withdraw the approval of a registered tax practitioner as well as remove his/her name from the register if :

- the registration was made in error;
- was made on information which proved false subsequent to registration;
- the tax practitioner is subject to disqualification;
- the tax practitioner is or has been found guilty of improper conduct .

Any of the above could allow the Board to think that the tax practitioner is not a fit and proper person.

In an information sheet published by the Australian Tax Practitioners Board, grounds for termination include conviction of a serious tax offence or conviction of an offence involving fraud or dishonesty, or being penalised for promoting a tax exploitation scheme (Australia, 2009:1).

The Board may withdraw approval of registration if the tax practitioner fails to pay any fee, monies or part thereof to the Board.

The legislation does provide some leniency, in that the tax practitioner has 30 days in which to submit reasons to the Board for not withdrawing the approval and the Board must give the tax practitioner written notice of its intention to withdraw the approval as well as the reasons for their decision.

The Australian legislation also prescribes that the Board must notify the tax practitioner of its decision to withdraw the approval of the registration as well as the reasons for its decision. It also provides that the Board must do so within 30 days from the date on which the decision was made and the termination date must be at least 28 days from the date of the notification of the withdrawal.

The Australian legislation provides reasonable time frames for the notification of the withdrawal of the approval and this should be considered in the South African legislation.

Should a tax practitioner request that his/her name be removed from the register, the Board is obliged to do so upon receipt of a written request from the tax practitioner.

Once a tax practitioner's name has been removed from the register, the Board must publish a notice of the removal in the *Gazette* or any other official publication which deals with the tax practitioner profession. The reason for the removal of the tax practitioner from the register should be stated in this publication, as removal owing to the retirement or

resignation of a tax practitioner is very different from being removed for disciplinary purposes (SAICA, 2008:8).

The removal of a tax practitioner's name from the register does not prevent the Board from instituting disciplinary proceedings against the tax practitioner for his/ her conduct prior to the date of removal.

In terms of the Australian legislation, once a tax practitioner has been removed from the register, the Board may specify a period during which the tax practitioner may not reapply for registration. This period may not exceed five years.

A similar provision should be taken into account in the South African legislation.

3.2 DUTIES OF TAX PRACTITIONERS

3.2.1 Duties with regard to practice of a registered tax practitioner

Tax practitioners play a critical role in shaping the attitudes and behaviours of taxpayers, as well as defining the actual levels of taxpayer compliance (SARS, 2006:4). They are also responsible for the proper functioning of the tax system, as this is reliant on the quality and responsible involvement of well-trained tax practitioners (SARS2006:4).

In a study by the OECD, it was noted that the majority of tax advisors assist their clients in avoiding errors as well as deterring them from engaging in unlawful or overly-aggressive activities (OECD, 2008:14). In addition, in some Forum on Tax Administration (FTA) countries, tax practitioners have no direct responsibility to the revenue other than to comply with the law. Their loyalty is to the client and their advice is in the client's best interest (OECD, 2008:14).

According to a discussion paper issued by SARS, tax practitioners are required to act with professionalism and due care. Further, they are required to possess a high standard of technical competence, conduct and performance, but, most importantly, they must act with integrity.

The Draft Bill sets out duties with which the registered tax practitioners must comply. These duties are (section 27(1)):

- The tax practitioner may not knowingly employ any person who is suspended from practice;
- The tax practitioner may not knowingly employ any person whose name has been removed from the register as a result of conviction of improper conduct and punishment imposed on that person;
- The tax practitioner may not practise if any fees or monies determined by the Board have not been paid in full;
- The tax practitioner may not sign any statement, report or other document which represents advice given or work to be performed, unless the advice or work was performed by the registered tax practitioner;
- The tax practitioner may not practice as a tax practitioner during any period that he/she has been suspended from practice;
- The tax practitioner may not fail to account for or unreasonably delay in accounting for any money or property received for, or on behalf of, a client or any other person when called upon to do so.

The first two duties seem rather harsh on the convicted tax practitioners. These provisions essentially ensure that a person cannot work in their area of expertise, even under the close supervision of a registered tax practitioner. A suggestion would be that this should apply only to repeat offenders and the affected tax practitioner should be able to work under the supervision of a registered tax practitioner until he/she has been rehabilitated (SAICA, 2008:7-8).

The third duty appears reasonable. However, a period of grace should be given to first-time offenders.

The fourth duty (section 27 (2)), which prevents a tax practitioner from signing any document unless he/ she has performed the work does not apply where:

- the work has been performed under the personal supervision or direction of a registered tax practitioner;

- the work was performed by or under the personal supervision or direction of any other registered tax practitioner who is a partner, co-director, co-member or supervisor in relation to him/her;
- the work was performed on behalf of the registered tax practitioner by any other registered tax practitioner;
- the work was performed by any other registered tax practitioner in a partially-completed assignment, which the other registered tax practitioner could not complete as a result of death, disability or other cause not under his/ her control and which assignment the registered tax practitioner concerned was engaged to complete;
- the work was performed outside the Republic by a member of a professional body outside the Republic whose status, in the opinion of the Board, is at least equal to that demanded by the Board for the profession in the Republic.

It is not clear whether the partner of a firm is required to sign off all tax returns prepared by his/her staff. If this is the case, it would not be practical, as large firms may have thousands of clients, and signing each one off would be virtually impossible (SAICA, 2007:8).

The fifth duty is also reasonable. Perhaps the affected tax practitioner could work under the close supervision of another registered tax practitioner until he/she has been rehabilitated. This should only be the case for non-repeat offenders.

The last duty ensures that the taxpayer is protected from unscrupulous tax practitioners who may use any money held in trust for purposes other than for what was intended. Tax practitioners should obtain written authorisation from their clients before disbursing any such funds or property (Australia, 2007:15).

In terms of the Australian legislation, the obligations of registered tax practitioners include:

- compliance with the taxation law;
- honest behaviour;
- lawfully acting in the best interest of the client;
- ensuring that there is no conflict of interest with the client or between clients;

- respecting the confidentiality of information disclosed by clients;
- disclosing client information only where they receive specific authority from the client or where there is a legal or overriding duty to disclose the information;
- exercising professional skill and care;
- keeping their skills and knowledge up to date;
- advising clients of their rights and obligations;
- ensuring that his/ her employees have the appropriate skills and experience and are appropriately supervised;
- accounting for all funds and property held on trust for clients and obtaining authorisation from the client to disburse such funds or property; and
- holding professional indemnity insurance (Australia, 2007:7-15).

Only a few of these duties have been included in the SA draft legislation. A suggestion would be to include more or all of the above duties in the legislation to provide more protection for the taxpayer when engaging a tax practitioner's services.

3.2.2 Discharging of duties of a registered tax practitioner

This section prescribes that the registered tax practitioner must comply with any Act which is administered by the Commissioner, as well as with the code of professional conduct determined by the Board.

This duty is included in the duties of an Australian tax practitioner. This is therefore in line with international trends.

3.2.3 Information to be provided by a registered tax practitioner

The registered tax practitioner is obliged to provide the following details to any person for whom the tax practitioner acts as such or any person who proposes to appoint him/ her as such:

- Full name and business address;
- Particulars of the title under which the tax practitioner practises; and
- Particulars of the place or places of business where the tax practitioner is in practice.

The tax practitioner must furnish the person with the above information within 14 days of receiving a written request.

The Australian legislation does not have a similar clause. However, it does appear reasonable for the tax practitioner to furnish such information if so requested.

3.2.4 Duty to inform Board of change of particulars

In terms of the Draft Bill, should the registered tax practitioner's name or business address change he/ she must notify the Board of the change within 30 days after the date on which the change takes place.

The Australian legislation does not have a similar clause. However, this does appear to be reasonable, as it enables the Board to keep the register of registered tax practitioners up to date.

3.3 DISCIPLINARY MATTERS

Chapter V of the Draft Bill sets out disciplinary matters, from the referral or allegation of improper conduct to the disciplinary proceedings once the investigation has taken place. The chapter also discusses the disclosure of certain information to the Board.

The disciplinary matters are discussed below.

3.3.1 Referral of proof/allegation of improper conduct

Part I of Chapter V of the Draft Bill gives guidance on when an allegation of improper conduct must be referred, as well as the regulatory body to which it must be referred.

Improper conduct is not specifically defined in the legislation. It has been suggested that the term be defined to ensure that this is not left to the discretion of the Board (SAICA, 2008:7). This goes hand-in-hand with the inclusion of the code of professional conduct in the legislation.

Where a court or any official of any body whose responsibility it is to regulate or supervise any entity or profession finds that there is proof of improper conduct on the part of a registered tax practitioner, they must provide the Board with a copy of the record of proceedings or report on that conduct (section 35).

Once the Board is satisfied that the allegations are based on reasonable grounds and appear to be justified, or receives any record as discussed above, then the case is referred to the relevant regulatory body. In the case of individuals who are registered with a regulatory body such as SAICA, the allegation is referred to that regulatory body for the relevant actions. In any other case, the allegation is referred to the investigating committee (section 36).

In terms of the Australian legislation, an investigation may arise when a complaint is made by a third party. The tax practitioner Board will then determine whether an investigation into the matter is warranted. In order to establish this, the Board may begin preliminary investigations.

Once the Board has decided to investigate the matter further, it has two weeks within which to notify the tax practitioner of its decision which must be in writing. (Australia, 2007:6). The Board may also refer complaints to the Tax Office (Australia, 2007:8).

A comparison of the legislation shows that the South African legislation does not make provision for notifying the tax practitioner of the intent to investigate him/ her. This should be considered so that the tax practitioner can prepare a proper defence.

3.3.2 Investigation

Should the allegation be referred to the investigating committee, the legislation prescribes that they must investigate the matter and obtain evidence to determine whether or not the registered tax practitioner should, in fact, be charged. If the committee decides that the tax practitioner should be charged, it then must recommend to the Board the charge or charges to be brought against him/her (section 37(1)).

The investigating committee may not, however, question the tax practitioner unless they inform him/her of their right to be assisted or represented by another person, and that there is no obligation to make any statement which may be used as evidence in the disciplinary hearing (section 37(2)).

In its investigations, the committee may require the tax practitioner or any other person to produce any working papers, statements, correspondence, books or other documents in his/ her possession which relate to the charge. The investigating committee may inspect and retain the information for the purposes of its investigation and can make copies of and take extracts from the information provided (section 37 (3)).

The legislation allows the investigating committee to obtain these documents regardless of whether the tax practitioner maintains that confidential client information is included in the information required by the committee (section 37(4)).

Once the committee has concluded the investigation, a report stating its recommendations must be given to the Board (section 37(5)).

In terms of the Australian legislation, neither the Board nor the investigating committee are bound by the rules of evidence. They are therefore able to conduct the investigation with as little formality as possible to ensure that the investigation process is not prolonged or too onerous for the tax practitioner (Australia, 2007:9).

The Board and the investigating committee are entitled to obtain information from a person in respect of the charge (Australia, 2007:9).

In comparing the legislation, it appears that this section of the SA legislation is in line with that of Australia.

3.3.3 Disciplinary proceedings

The Draft Bill prescribes that the Board must charge a registered tax practitioner with improper conduct if the investigating committee recommends that there are sufficient

grounds for doing so. The Board must then furnish the registered tax practitioner with a charge sheet by hand or registered mail. This charge sheet must inform the tax practitioner of both the details and nature of the charge and the fact that the tax practitioner must either admit or deny the charge in writing, along with a written explanation of the improper conduct with which he/she is charged. The practitioner must also be informed of the period (which must be reasonable but not exceed 60 days) within which the plea must be submitted to the Board (sections 38(1), (2) and (3)). On expiry of this period, the Board must refer any charge sheet and plea to be dealt with by the disciplinary committee (section 38(5)).

Should the tax practitioner admit guilt, then he/she is found guilty as charged (section 38(4)).

The mere fact that a registered tax practitioner has been convicted or acquitted in a court of law does not bar proceedings against the tax practitioner under this Act (section 38(6)).

The legislation does not provide a time frame in which the Board must deliver the charge sheet to the registered tax practitioner. This should be considered in order to make sure that the investigation is not prolonged.

The Draft Bill obliges the disciplinary committee to conduct the disciplinary hearing (section 39(1)).

The disciplinary committee must appoint a person from the investigating committee to present the charge to the disciplinary committee and may at any time terminate or replace that person if they are under the impression that this person is not fulfilling his/her obligations (section 39(2)).

The disciplinary committee may also amend the charge sheet or charge on the grounds that there is an error in the formulation of that charge or else the charge is not clear in the original charge sheet (section 39(3)).

This section is welcomed, as it ensures clarity on the charges the tax practitioner faces and enables him/her to prepare a proper defence (SAICA, 2008:8). The tax practitioner should be given reasonable notice of the amendment to enable him/her to prepare the defence accordingly.

All disciplinary hearings are held in camera, except when the chairperson is of the opinion that any part of the hearing should be open to the public. Should the details of the tax affairs of any taxpayer be disclosed during the hearing, the hearing may only be attended by persons who are essential to the proper consideration of the complaint (section 39(4)).

The disciplinary committee may subpoena any person who may be able to provide material information relevant to the hearing or whom it suspects has any information, including, inter alia, working papers or documents that have any bearing on the charges presented at the hearing. The legislation prescribes specific rules for the subpoena. The chairperson of the disciplinary committee may also call upon any witness and administer an oath or take an affirmation from the witness (section 39(5) and (7)).

This is also the case in the Australian legislation (Australia, 2007:9), which appears to be fair and reasonable.

The disciplinary committee is entitled to retain any information for the duration of the hearing (section 39(6)).

The Draft Bill allows the tax practitioner being charged certain rights at a disciplinary hearing.

In terms of section 39(8) of the Draft Bill, the tax practitioner:

- may be assisted or represented by another person when the proceedings are being conducted;
- has the right to be heard;
- may call witnesses;
- may cross-examine any person called as a witness in support of the charge;
- may have access to documents produced in evidence; and

- may admit at any time before the conclusion of the disciplinary hearing that he/she is guilty of the charge.

The person appointed to present the charge to the disciplinary committee may lead evidence and advance arguments in support of the charge. He/she may also cross-examine witnesses, question any person subpoenaed or call anyone to give evidence or produce information or documents which are believed to have a bearing on the hearing (section 39(9)).

A witness who has been subpoenaed may not-

- fail to attend the hearing without sufficient cause,
- refuse to be sworn in or be affirmed as a witness,
- fail to answer all questions fully and to the best of his/her knowledge,
- fail to produce any information or documentation which he/she is required to produce (section 39(10)(a)).

The witness may not give a false statement having once been sworn in or affirmed as a witness (section 39(10)(e)). The witness must also remain in attendance until he/she has been excused, and may request that the names of the members of the disciplinary committee be provided to him/her (section 39(10)(b) and (c)).

In terms of the Australian legislation, the Board or the investigating committee are also able to subpoena witnesses and have the power to take evidence on oath or affirmation (Australia, 2007:9). In addition, persons who are required to attend the investigation are entitled to be paid an allowance in respect of the time and expenses incurred in carrying out their role. Witnesses are also allowed to give evidence in the form of a written statement which is verified by oath or affirmation, instead of appearing before the Board or investigating committee (Australia, 2007:10).

In terms of the Draft Bill, the law relating to privilege may apply in relation to the examination of any information or documentation. In addition, a person may not prevent another person from complying with a subpoena or from giving evidence or providing information which he/she is required to give (section 39(d) and (f)).

In terms of the Australian legislation, the investigations powers do not override the principles of legal professional privilege.

The record of evidence is admissible without any further evidence being led if the record is accompanied by a certificate from the chairperson stating that the investigation was lawful, reasonable and procedurally fair (section 39(11)).

If the conduct amounts to an offence for which the tax practitioner was convicted in a court of law, a certified copy of the trial and conviction is sufficient proof that the tax practitioner committed the offence, unless the conviction was overturned by a superior court (section 39(12)).

Once the hearing has been concluded, the disciplinary committee has 30 days within which to decide whether or not the tax practitioner is guilty of the charge. If the committee finds the tax practitioner guilty, any aggravating or mitigating circumstances must be taken into account by the disciplinary committee, who must also advise the tax practitioner and Board of their decision (section 40(1) and (2)).

In terms of the Australian legislation, the Board must advise the tax practitioner of the decision, but has six months within which to make that decision (Australia, 2007:12). The SA legislation appears more reasonable in this regard, as it ensures that the proceedings are not prolonged and any tax practitioner who is not found guilty of misconduct will be able to carry on with his/her business as normal.

A tax practitioner who is found guilty may address the committee as well as call witnesses to give evidence in mitigation of the sentence (section 40(3)).

If the registered tax practitioner is found guilty of improper conduct, the disciplinary committee is obliged in terms of section 40(3)(a) of the Draft Bill to

- caution or reprimand the registered tax practitioner;
- suspend the right to practise as a registered tax practitioner for a specific period;
- cancel the registration of the registered tax practitioner concerned and remove his/her name from the register referred to in section 6(c) of the Draft Bill.

The disciplinary committee may also order the tax practitioner to pay any reasonable costs incurred by the investigating and disciplinary committees or part thereof (section 40(4)). This must be recovered by the Board and the amount must be paid into the funds of the Board (section 40(6)).

In terms of this, clarity should be provided regarding the costs. It has been suggested to SARS that the High Court tariff be used to determine these costs (SAICA, 2008:8).

The Board may publish the findings of the disciplinary committee as well as the sanction imposed on the tax practitioner and must give effect to the decision of the disciplinary committee (section 40(5)).

Tax practitioners who are found guilty under the Australian legislation are able to appeal the decision (Australia, 2007:14). This should be considered by the South African legislation to ensure that tax practitioners undergo a fair investigation.

It was noted in the study by the OECD that Australia promotes penalty laws (OECD, 2008:20). The South African legislation should also consider legislating financial penalties for non-compliant tax practitioners as a deterrent to non-compliance.

Section 41 of the Draft Bill states: “Nothing in this Act affects the right of any professional body to take disciplinary or other action against any of its members, in accordance with its constitution and rules”. This section creates a situation which allows the tax practitioner to be punished twice for the same charge. The tax practitioner should be subject to the sanctions of either the regulatory body of which they are a member or the Board, but not both (SAICA, 2007:6-7).

3.3.4 Disclosure of information

This section prohibits the disclosure of any information obtained in the course of the investigation or disciplinary proceedings, except where the information is for the purposes of the investigation, in the performance of duties under the Act, where the information is to be provided to a person authorised by the Board and needs it to perform his/ her functions,

where a court so instructs, at the written request of any competent authority which needs it for the institution of criminal proceedings or investigation into whether criminal proceedings should be instituted (section 42).

This section appears to be fair and reasonable, as it protects the taxpayer.

3.4 MISCELLANEOUS MATTERS

3.4.1 Powers of Minister

In terms of the draft legislation, the Minister may, by notice in the *Gazette*, make regulations regarding:

- any matter relating to the functioning of the Board;
- any ancillary or incidental administrative or procedural matter;
- any transitional matter relating to this Act.

These regulations must ensure efficiency, proper implementation and administration of the carrying out of the legislation and promotion of good order to the functioning of the Board.

The Minister may also delegate any of his/her powers in terms of this Act to the Director General or any other official of Treasury, but is prohibited from delegating the power to make such regulations and to appoint the members of the Board.

These powers appear to be reasonable, but parliament should be aware of any proposed regulations, and the public should be requested to comment before such regulations are gazetted.

3.4.2 Indemnity of Board, committees, members and employees

The draft legislation indemnifies the Board, any member or employee of the Board, any committee of the Board and any member of the Committee of the Board from any liability in respect of an act or omission which was performed in good faith under or by virtue of any provision of this legislation, unless the act was grossly negligent.

There is no mention in the legislation of what would be considered as grossly negligent, nor is there any mention of an independent committee to adjudicate on this matter.

3.4.3 Rules and administrative matters

In terms of the draft legislation, "The Board may make rules on any matter –

- (a) which is under this Act required or permitted to be prescribed by the Board; and
- (b) which the Board deems necessary or expedient to be prescribed for the better achieving the objects of the Board and of this Act".

The draft legislation also provides the Board with the power to make different rules in respect of different persons of matters relevant to the functions of the Board. The legislation does, however, ensure that the differentiation does not amount to unfair discrimination.

The Board must publish a draft proposal of the amended rule(s) in the *Gazette*, together with a notice requesting public comment before the Board is allowed to prescribe the rule(s). The period for comment must be included in this notice and may not be less than 30 days from the date of the publication of the notice.

Should any changes be made to the proposed amendment owing to comments received from the public, the Board need not publish this before prescribing the rule.

The legislation also provides the Board with the authority to immediately publish a rule without public consultation should the circumstances necessitate it.

This section appears to be fair, as it invites the public to comment on any changes before they are made.

3.4.4 Offences

The draft legislation sees a person to be guilty of an offence under the following circumstances:

- failure to register in terms of section 23;
- failure to attend at the time and place specified in a summons without sufficient cause;
- failure to remain in attendance until excused from further attendance by the chairperson of the disciplinary committee;
- refusal to produce any book, document or thing of which he/she has possession, custody or control when required to do so under section 39(5);
- refusal to be sworn in or to affirm as a witness when required under section 39(7);
- failure to answer all questions lawfully put to him/her concerning the subject of the hearing without sufficient cause and satisfactorily to the best of his/her knowledge and belief;
- giving a false answer to any question lawfully put to him/her having been duly sworn in or having made an affirmation, knowing the answer to be false;
- making a false statement on any matter having been duly sworn in or having made an affirmation, knowing the statement to be false;
- he/she hinders any person from acting in the capacity of a member of the disciplinary committee in the exercise of any power conferred upon that person;
- he/she applies to any company, body, firm, business, or undertaking a name or description signifying or implying some connection between the company, body, firm or business or undertaking of the Board.

The punishment in respect of the conviction of any of the above offences is a fine or imprisonment for a period not exceeding two years.

The Australian legislation has similar provisions, but penalises a person using a points system linked to a monetary value.

In light of this, it appears that the South African legislation is in line with the Australian legislation, bar the penalty system.

3.4.5 Furnishing of registration information to Board

The draft legislation gives the Commission the authority to furnish the Board with the registration information on tax practitioners collected in terms of section 67A of that Act.

3.5 CONCLUSION

Chapter 3 dealt with the registration and deregistration of tax practitioners, the duties of tax practitioners and disciplinary and miscellaneous matters.

The most prominent issues are:

- controversy over who should be registered as a tax practitioner;
- individuals who are exempt from registering as tax practitioners;
- possible abuse of the disciplinary procedures;
- possible unfair dismissal of tax practitioners;
- uncertainty regarding the duties of tax practitioners.

Chapter 4 will detail the most prominent issues as well as comments and suggestions to resolve the issues.

CHAPTER 4: CONCLUSION

4.1 INTRODUCTION

The registration of tax practitioners in SA will play a vital role in SARS' continued struggle to reduce the tax gap and will ultimately change the compliance culture in SA by developing a culture of efficient and effective tax collection.

The Bill regulating tax practitioners will ensure that tax practitioners provide a service to the public in accordance with appropriate standards of professional and ethical conduct (Australia, 2008:5) and will equalise tax practitioners. A great advantage of this will be that the taxpayer is protected against unscrupulous and aggressive tax practitioners.

In its communiqué to its members, SAICA stated that "The regulatory interest of SARS is therefore similar to that in other areas of consumer protection. It is our firm belief that public interest is best served by ensuring the competence and quality of practitioners whilst also ensuring that an adequate number of practitioners is available to serve the public" (SAICA, 2008).

In saying this, it is important that we learn from international counterparts, such as Australia, who have successfully implemented tax practitioner regimes.

The rest of the chapter will discuss the main issues in the study as well as comments and suggestions on these issues.

4.2 THE REGULATORY BOARD

4.2.1 Composition of the Board

Currently, the Draft Bill only provides guidance on the appointment of four of the Board members. Further guidance should be provided in terms of the appointment of the

remaining three members, as this would avoid confusion about who to appoint and the basis on which to appoint them.

4.2.2 Objectives of the Board

At present, the SA legislation does not provide a minimum standard in respect of the required level of qualifications or experience for tax practitioners, nor does it provide guidance in respect of a code of conduct, as these are left to the Board to establish.

In the Australian legislation these requirements are legislated and the Board is required to enforce the requirements.

It is therefore recommended that, instead of leaving this to the Board, it should be legislated in the Bill regulating tax practitioners and the Board should merely ensure that the code of conduct is adhered to by all registered tax practitioners. Currently, some of the practitioners are subject to the code of conduct of their professional regulatory Boards, such as SAICA. This should be taken into account when setting out the accreditation process in the Bill.

SAICA has suggested that their accreditation model, i.e. their standards and rules, be adopted by SARS in respect of the tax practitioner accreditation (SAICA, 2008). This may be a reasonable solution and would avoid pointless repetition.

4.2.3 Funds, financial management and payment to members

A controversial issue in the draft legislation regulating the financial duties of the Board is the remuneration of the Board members. SAICA has suggested to SARS that the remuneration of the Board members be independently determined, and not decided by the Board members. This would avoid the potential misappropriation of funds and would remunerate Board members fairly.

4.3 TAX PRACTITIONERS

4.3.1 Registration

The current draft legislation refers to any natural person and individual. This is causing confusion in the matter of who should register as a tax practitioner. SARS should therefore clarify whether this Act applies to any natural person or individual.

The registration of partnerships and companies as tax practitioners should be considered as according with international standards. This would reduce the number of registered individual tax practitioners and the consequent administration substantially.

In addition, SARS should incorporate guidance on how to judge whether someone is a “fit and proper person” by including objective tests to determine who is eligible to register as a tax practitioner, such as those included in the Australian legislation (Australia, 2008:11). This would eliminate uncertainty on this matter.

When reviewing the section on the application and registration of a tax practitioner, a reasonable time frame should be set out when it comes to the approval/rejection of an application. In comparison with the Australian legislation, there is no time frame, and this would cause uncertainty as to the status of the application. In addition, a minimum period of registration should be prescribed in the legislation, as in the Australian legislation, which specifies a period of three years. The Australian legislation further provides for the renewal of a registration, which the SA legislation does not do.

4.3.2 Persons exempt from registering

Another area of contention is the exemption of certain persons from registration as tax practitioners. SARS should consider registering tax practitioners who advise on the Customs & Excise Act, as the legislation requires the registration of a tax practitioner providing advice in respect of *any* Act administered by SARS. In other words, Customs & Excise practitioners should not be excluded from registering as tax practitioners, as they are, in essence, advising on an Act which is administered by the Commissioner.

SARS should reconsider the exemption relating to persons who provide tax advice as an incidental service to their main service offering. The reason for this is that these individuals may cause more harm than good, as they are not specialised in tax law and may provide advice that is outdated or incorrect. The registration of these individuals would further protect the taxpayer.

4.3.3 Duties of tax practitioners

In addition to the legislated duties of a tax practitioner, legal privilege should be extended to the tax practitioner profession. This would allow the taxpayer to seek proper professional advice without fear of being reported to SARS (SAIPA, 2007:1-2). This was raised in the study by the OECD. In this study it was noted that accountant-client privilege would prevent the disclosure of confidential information, which is created in anticipation of tax litigation (OECD, 2008:15). New Zealand is one of the countries that enjoy this protection.

4.3.4 Disciplinary proceedings

Regarding the disciplinary proceedings and penalties to be imposed on tax practitioners who are found guilty of an offence, the term “improper conduct” should not be left to the Board’s discretion and should be legislated and left for the Board to enforce. This would eliminate any inconsistencies in the interpretation of the term.

No time frames are legislated in the Bill and this could give rise to proceedings carrying on for unlimited time. A recommendation would be to legislate a time limit for instituting proceedings against a tax practitioner to avoid prejudicing the practitioner’s practice and clients (SAIPA, 2007:3).

Further, in the SA legislation there is no explanation of an appeal process as there is in the Australian legislation. This should be considered when finalising the Bill to avoid any cases where the original verdict was unfair.

In terms of the penalties, a points system similar to the one applied in Australia should be considered. This system distinguishes between individuals and other bodies. The points are linked to a monetary value, which could result in financial penalties for the tax practitioner.

Finally, SARS should consider relief from certain tax shortfall penalties for taxpayers who engage tax practitioners, as in Australia (Australia, 2007). It should, however, provide the tax practitioner with some protection against taxpayers who do not disclose their full tax position to their tax practitioner.

4.4 FINAL COMMENTS

In light of the above, SARS should take cognisance of the findings of this critical review of the SA legislation and the comparison with Australia. It should also consider implementing the recommendations, thus ensuring that the SA legislation was in accordance with international standards.

LIST OF REFERENCES

Australia. 2009. *Tax Agent Services Regulations 2009*. [Online] Available from [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/C9579D9DDE13C0CCCA25766D0004901D/\\$file/0605544A091023ZEV.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/C9579D9DDE13C0CCCA25766D0004901D/$file/0605544A091023ZEV.pdf) [Downloaded: 2010-05-19].

Australia. 2007. *Tax Agent Services Bill 2008*. [Online] Available from <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd064.pdf> [Downloaded: 2011-04-10].

Australia. 2007. *Tax Agent Services Draft Explanatory Memorandum*. [Online] Available from http://www.treasury.gov.au/documents/1218/RTF/070320_ExpMemo_Tax_Practitioners_Chapter1.rtf [Downloaded: 2007-07-15].

Australia. 2007. *Tax Agent Services Draft Explanatory Memorandum*. [Online] Available from http://www.treasury.gov.au/documents/1218/RTF/070424_ExpMemo_Tax_Practitioners_Chapter2.rtf [Downloaded: 2007-07-15].

Australia. 2007. *Tax Agent Services Draft Explanatory Memorandum*. [Online] Available from http://www.treasury.gov.au/documents/1218/RTF/070501_ExpMemo_Tax_Practitioners_Chapter3.rtf [Downloaded: 2007-07-15].

Australia. 2007. *Tax Agent Services Draft Explanatory Memorandum*. [Online] Available from http://www.treasury.gov.au/documents/1218/RTF/070320_ExpMemo_Tax_Practitioners_Chapter4.rtf [Downloaded: 2007-07-15].

Australia. 2007. *Tax Agent Services Draft Explanatory Memorandum*. [Online] Available from

http://www.treasury.gov.au/documents/1218/RTF/070320_ExpMemo_Tax_Practitioners_Chapter5.rtf [Downloaded: 2007-07-15].

Organisation for Economic Co-Operation and Development. 2002. *Guidance Note – Compliance Risk Management: Managing and Improving Tax Compliance* [Online] Available from <http://www.oecd.org/dataoecd/44/19/33818656.pdf> [Downloaded: 2010-05-24].

Organisation for Economic Co-Operation and Development. 2005. *Second Meeting of the forum on tax administration* [Online] Available from <http://www.oecd.org/dataoecd/6/37/35093430.pdf> [Downloaded: 2010-05-24].

Organisation for Economic Co-Operation and Development. 2008. *Study into the Role of Tax Intermediaries*. [Online] Available from <http://www.oecd.org/dataoecd/28/34/39882938.pdf> [Downloaded: 2010-05-24].

South Africa. 2008. Revised Draft Bill. *Regulation of Tax Practitioners Bill*. [Online] Available from <http://www.sars.gov.za/home.asp?pid=#294> [Downloaded: 2010-05-24].

South Africa. 1962. *The Income Tax Act 58 of 1962*. Pietermaritzburg: Interpak Books.

South African Institute of Chartered Accountants. 2008. *Call for Comment – Revised Draft Regulation of Tax Practitioners Bill*. [Online] Available from <https://www.saica.co.za/documents/SAICASubmissionRevisedDraftRegulationTaxPractitionersBill.pdf> [Downloaded: 2010-05-24].

South African Institute of Chartered Accountants. 2008. Revised Tax Practitioners Bill. [Online] Available from

<https://www.saica.co.za/News/MediaKit/Publications/Communiqu%C3%A9/Communiqu%C3%A918September2008/RevisedTaxPractitionersBill/tabid/1084/en-US/Default.aspx>

[Downloaded: 2011-04-10].

South African Institute of Chartered Accountants. 2007. *Call for Comment –Draft Regulation of Tax Practitioners Bill*. [Online] Available from https://www.saica.co.za/documents/Submissions/Legislation_Tax/Submission_tax_Draft%20Regulation%20of%20Tax%20Practitioner%20Bill.pdf [Downloaded: 2010-05-24].

South African Institute of Chartered Accountants. 2008. *Joint Submission –Draft Regulation of Tax Practitioners Bill*. [Online] Available from https://www.saica.co.za/documents/Submissions/Legislation_Tax/Submission_tax_Draft%20Regulation%20of%20Tax%20Practitioner%20Bill.pdf [Downloaded: 2010-05-24].

South African Institute of Professional Accountants. 2007. *Response in terms of call for comment – Draft Regulation of Tax Practitioners Bill*. [Online] Available from http://www.saipa.co.za/documents/SAIPA_Regulation%20of%20Tax%20Practitioners_4April07.pdf [Downloaded: 2010-05-24].

The South African Institute of Tax Practitioners. 2008. *Joint Submission – Comment on the Revised Draft Regulating Tax Practitioner Bill*. [Online] <http://www.thesait.org.za/downloads/SAIT-IAC-ICSA-ICB-SAIBA-Joint-Comment-2nd-Draft-TP-Bill.pdf> [Downloaded: 2010-05-24].

South African Revenue Service. Not Dated. *Brochure for Practitioners: Registration of Tax Practitioners*. [Online] Available from: <http://www.sars.gov.za/home/.asp?pid=168#PractitionersRegistrationBrochure.pdf>. [Downloaded: 2007-08-30].

South African Revenue Service. 2002. *Discussion Paper: Regulating Tax Practitioners*. [Online] Available from: <http://www.sars.gov.za/home.asp?pid=168#SARS20discussion20paper20regulating20tax20practitioners202002.pdf> [Downloaded: 2007-07-15].

South African Revenue Service. 2006. *Discussion Paper: Practitioners*. [Online] Available from:

<http://www.sars.gov.za/home.asp?pid=168#Practitionersdiscussion.pdf> [Downloaded: 2007-07-15].

South African Revenue Service. Not Dated. *Tax Practitioners Registration*. [Online] Available from: <http://www.sars.gov.za/home.asp?pid=1328> [Downloaded: 2007-08-30].

South African Revenue Service. 2008. *Briefing Note: Revised Draft Regulation of Tax Practitioners Bill*. [Online] Available from <http://www.sars.gov.za/home.asp?pid=168#RevisedDraftBillBriefingNote.pdf> [Downloaded: 2008-07-01].

South African Revenue Service. Verbal communication on 12 May 2011. Johannesburg.

Vanek, M. 2008. *Tax practitioners no longer required to snitch on clients*. Moneywebtax, 3 June 2008. [Online] Available from <http://www.moneywebtax.co.za/moneywebtax/view/Moneywebtax/en/page197?oid=7691&sn=Detail>. [Downloaded: 2010-05-20].

Robertson, A. 2010. *Australia adopts national tax standards*. Lateline Business, 1 March 2010. [Online] Available from <http://www.abc.net.au/lateline/business/items/201003/s2833716.htm>. [Downloaded: 2010-05-20].

Swire, M. 2008. *Australia Launches National Tax Practitioners Board*. News.com, 28 October 2009. [Online] Available from http://www.tax-news.com/news/Australia_Launches_National_Tax_Practitioners_Board_39828.html. [Downloaded: 2010-05-20].