



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
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4 February 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: committeescrutiny@treasury.gov.au; chris.reside@treasury.gov.au


Dear Treasurer,

Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 [F2020L01406]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Modification of primary legislation

Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). In addition, Senate standing order 23(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes where an instrument enacts significant policy measures or appears to limit parliamentary oversight.

The Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 [F2020L01406] (the instrument) specifies that certain services are business activity statement services (BAS services) for the purposes of the definition of a 'BAS service' in section 90-10 of the *Tax Agent Services Act 2009*. This enables BAS agents to lawfully provide the following services without being a registered taxation agent:

- a service under the *Superannuation Guarantee (Administration) Act 1992* to the extent that the service relates to a payroll function or payments to contractors;
- a service under the *Superannuation Guarantee Charge Act 1992*;
- a service under Part 3B of the *Superannuation Industry (Supervision) Act 1993*;
- a service under Part 5-30 in Schedule 1 to the *Tax Administration Act 1953*;
- a service under sections 202CD and 202CF of the *Income Tax Assessment Act 1936*; or
- a service under section 9 of the *A New Tax System (Australian Business Number) Act 1999*.

The committee has long been concerned with provisions in delegated legislation which modify the operation of primary legislation, particularly where those modifications appear to substantially depart from the original provision. The committee therefore expects the explanatory statement to such instruments to comprehensively justify the nature and scope of the relevant modifications.

In this regard, the committee notes that the explanatory statement explains that there is a need for ongoing flexibility for the Tax Practitioners Board to determine what is considered a BAS service. While acknowledging the need for flexibility it remains unclear why it was considered necessary and appropriate to address these matters in delegated legislation considering the significant policy changes that the instrument provides.

The committee is also concerned that these modifications to the operation of primary legislation appear to be intended to remain in force for at least 10 years (until the instrument sunsets under the *Legislation Act 2003*). The committee's longstanding view is that provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In light of the above the committee requests your advice as to:

- **why it is considered necessary and appropriate for the measures in the instrument to be provided for in delegated legislation, noting that they make substantial policy changes which appear more appropriate for parliamentary enactment; and**
- **whether the instrument can be amended to specify that it will cease to operate three years after commencement.**

Compliance with authorising legislation

Senate standing order 23(3)(a) requires the committee to scrutinise each legislative instrument as to whether it accords with its enabling Act and otherwise complies with all legislative requirements.

The instrument is made under subsection 90-10(1A) of the *Tax Agent Services Act 2009* (the Act) and, as noted above, expands the scope of a BAS service as defined by the Act. However, the explanatory statement does not identify the legislative power by which the definition of a BAS service may be extended to matters which may not be included or closely related to the concept of a BAS service as set out in the Act.

In the committee's view it is unclear that services related to the superannuation guarantee charge are within the concept of a 'BAS service', and therefore, without further explanation, the committee considers that the legislative authority for making the instrument is unclear.

In light of this, the committee requests your advice as to whether, and if so, how, subsection 90-10(1A) of the *Tax Agent Services Act 2009* enables the definition of a 'BAS service' to be extended to services related to the superannuation guarantee charge.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. Noting that the 15th sitting day after the instrument was tabled in the Senate is 15 February 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **18 February 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000468

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Via email: sdlc.sen@aph.gov.au

Dear Senator

Thank you for your letter dated 4 February 2021, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting advice in relation to the *Tax Agent Services (Specified BAS Services No. 2) Instrument 2020* [F2020L01406] (Instrument).

The use of delegated legislation

You have requested my advice as to why it is considered necessary and appropriate to prescribe BAS Services in delegated, rather than primary, legislation.

The use of delegated legislation is justified in recognition of the need to account for the variety and complexity of services that may be provided by BAS agents. I note that in dealing with the circumstances in which a BAS agent is providing certain services, the regulations only have applicability in relation to a limited class of persons. Therefore, it is appropriate that the detail of these matters is dealt with in regulations, rather than in the primary law.

If these matters were to be inserted into the *Tax Agent Services Act 2009*, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of persons. This would result in unnecessary complexity for other users of that Act.

Subsection 90-10(1A) and services related to the Superannuation Guarantee Charge

You have also requested further advice as to whether, and if so, how, subsection 90-10(1A) of the *Tax Agent Services Act 2009* enables the definition of a 'BAS service' to be extended to services related to the superannuation guarantee charge.

On 30 June 2013, the *Tax Agent Services Act 2009* was amended to give the Tax Practitioners Board (TPB) the ability to declare a service, by way of a legislative instrument, to be a BAS service.

In early 2019, the TPB identified that the *Tax Agent Services (Specified BAS Services) Instrument 2016* did not adequately define the scope of services provided by BAS agents in relation to the superannuation guarantee and the superannuation guarantee charge. In particular, the TPB identified that representing a client in their dealings with the Commissioner of Taxation was limited to services insofar as they related to a payroll function or payments to contractors, and therefore, did not extend to representing a client in their dealings with the Commissioner of Taxation in relation to the superannuation guarantee charge.

The Instrument was introduced to allow BAS agents to lawfully provide certain services (including services related to the superannuation guarantee charge) that extend beyond the legislative definition of BAS provisions but which the TPB considers appropriate that BAS agents be permitted to provide.

Shortening the sunset period

The Committee has expressed concern regarding the legislative instrument remaining in force for a total of 10 years after commencement, noting that the Committee's view is that instruments which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence.

The use of a 10 year sunset period is necessary and appropriate for the Instrument on the basis that there would be appreciable business uncertainty around the treatment of, or framework for, business activities giving rise to significant commercial risks and costs if the sunset period was shorter. For instance, BAS agents require certainty around what services they can offer into the future so as to make appropriate investment decisions (business development costs, training etc).

Furthermore, the instrument deals with confined and unique circumstances affecting a particular class of entities (BAS agents) which do not fit within the strict operation of the primary law but would result in anomalous or inconsistent outcomes given the intent of the primary legislation.

Notwithstanding the above, as noted in my previous correspondence with the Committee, there will be broader good faith discussions with the Committee in relation to the sunset period for legislative instruments in the Treasury portfolio following the tabling of the Committee's final report into the *Exemption of delegated legislation from parliamentary oversight*.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

15 / 3 /2021



14 April 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au; chris.reside@treasury.gov.au

Dear Treasurer,

Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 [F2020L01406]

Thank you for your response of 15 March 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 13 April 2021 and has resolved to seek your further advice about the issues outlined below.

Compliance with authorising legislation

Modification of primary legislation

Parliamentary oversight

The committee requested your advice as to how subsection 90-10(1A) of the *Tax Agent Services Act 2009* (the Act) enables the definition of a BAS service to be extended to services related to the superannuation guarantee charge. You advised that the Tax Agent Services (Specified BAS Services) Instrument 2016 did not extend the scope of services provided by BAS agents to services related to the superannuation guarantee charge. You further advised that the Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 (the instrument) was therefore introduced to allow BAS agents to lawfully provide services such as those related to the superannuation guarantee charge extending beyond the legislative definition of BAS provisions which the Tax Practitioners Board considers appropriate for BAS agents.

You also advised that it is appropriate for the measures in the instrument to be in delegated legislation as to insert them into the Act would insert provisions which apply to a relatively small group of persons into an already complicated legislative framework. You further advised that the 10-year sunset period is appropriate to prevent business uncertainty and shorter sunset would give rise to significant commercial risks and costs.

However, the committee's view remains that the measures in the instrument are not so complicated that it would be inappropriate to insert them into the Act, and that any potential uncertainty can be alleviated by including these measures in the primary legislation.

The instrument appears to be a substantial extension of the provisions of the Act and appears to be intended to remain in force for at least 10 years. The committee therefore reiterates its concerns that the instrument, which modifies the operation of primary legislation, is intended to remain in force until it sunsets. The committee's longstanding view is that provisions which modify the

operation of primary legislation should cease to operate no more than three years after they commence, to ensure a minimum degree of parliamentary oversight.

The committee's scrutiny concerns in this regard are underscored by the fact that it remains unclear to the committee whether subsection 90-10(1A) of the Act provides the legislative authority for the meaning of BAS services to be extended to include services beyond services dealing with business activity statements (such as services relating to superannuation), by legislative instrument.

The committee notes in particular your advice that the instrument is extending the legislative definition of BAS services to include services relating to the superannuation guarantee charge. It is unclear to the committee based on your advice whether to do so is within the scope of the enabling Act.

Subsection 90-10(1A), when read in its legislative context, appears to require the extension of services provided by BAS agents to relate to business activity statements, as all the services referred to in subsection 90-10(1) as BAS services relate to BAS provisions. This is relevant context for the scope of power to specify another service as a BAS service by legislative instrument made under subsection 90-10(1A). In the absence of any information to the contrary it therefore appears to the committee that the instrument may be beyond the scope of its enabling provision.

The committee would therefore appreciate your further advice as to how subsection 90-10(1A) of the *Tax Agent Services Act 2009* authorises delegated legislation to extend BAS services to those relating to the superannuation guarantee charge, noting that subsection 90-10(1) appears to limit such delegated legislation to specifying services that relate to business activity statements.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. The committee therefore gave notice of a motion to disallow the instrument on 15 February 2021 as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 April 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON MICHAEL SUKKAR MP
Assistant Treasurer
Minister for Housing
Minister for Homelessness, Social and Community Housing

Ref: MS21-000966

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for your correspondence, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting advice in relation to the *Tax Agent Services (Specified BAS Services No. 2) Instrument 2020* [F2020L01406] (Instrument).

The Committee has asked for further advice as to how subsection 90-10(1A) of the *Tax Agent Services Act 2009* (Act) authorises delegated legislation to extend business activity statement (BAS) services to those relating to the superannuation guarantee charge.

Advice

The power to make the Instrument is within the scope of the Act. This includes specifying in the Instrument that services under the *Superannuation Guarantee Charge Act 1992* are 'BAS services' for the purposes of subsection 90-10(1A) of the Act. The following analysis outlines the reasons for this conclusion.

Analysis

The Act authorises delegated legislation to extend 'BAS service' to other categories of tax agent services in addition to those specified in subsection 90-10(1) of the Act, and the Act does not require that the specified service be related to those already covered by subsection 90-10(1).

Section 90-10 of the Act provides that a 'BAS service' must:

1. fall within the definition in subsection 90-10(1); or
2. be specified by legislative instrument made under subsection 90-10(1A); and
3. not be excluded by subsection 90-10(2).

The services related to a superannuation guarantee charge identified by the Committee meet the criteria in subsection 90-10(1A) of the Act on the basis that subsection 5(b) of the Instrument specifies that "a service under the *Superannuation Guarantee Charge Act 1992*" is a 'BAS service'.

These services meet the criteria in subsection 2, as it is not excluded by the regulations, and there is nothing in the wording of subsection 90-10(2) which requires a service under subsection 90-10(2) to relate to or meet any of the criteria in subsection 90-10(1).

As a matter of construction, the content of section 90-10(1) does not itself limit the services that can be prescribed under subsection 90-10(1A). Further, there is no clear basis on which to conclude that a subject matter constraint is intended to apply to the kind of services that can fall within the definition which is implied from the content of subsection 90-10(1) of the Act, the title of the services (being 'BAS services') and/or the Act more broadly.

It is relevant to note that BAS services are clearly intended to be a subset of tax agent services. As a practical matter it is not clear what services could be both tax agent services and also relate to BAS provisions/statements without already being covered by subsection 90-10(1), so it is not clear that subsection 90-10(1A) would have a discernible function if it were limited in the manner suggested by the Committee.

Finally, it is consistent with the expressed Parliamentary intention that subsection 90-10(1A) be used to expand the range of services that are BAS services to allow the Tax Practitioners Board to ensure that the regulatory framework continues to reflect industry practice (see paragraphs 1.56, 1.59, 1.31 and 1.32 of the Explanatory Memorandum to the Tax Laws Amendment (2013 Measures No 3) Bill 2013).

For these reasons, I have been advised by the Tax Practitioners Board that it does not consider that subsection 90-10(1) of the Act limits delegated legislation made under subsection 90-10(1A) of the Act to specifying services that relate to BAS.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

The Hon Michael Sukkar MP



13 May 2021

The Hon Michael Sukkar MP
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Via email: atdlo@treasury.gov.au

CC: minister.sukkar@treasury.gov.au

Dear Assistant Treasurer,

Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 [F2020L01406]

Thank you for your response of 30 April 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 12 May 2021.

You advised that the power to make the instrument is within the scope of subsection 90-10(1A) of the *Tax Agent Services Act 2009* (the Act). You advised that subsection 90-10(1A) includes the power to specify that services under the *Superannuation Guarantee Charge Act 1992* (the Superannuation Act) are 'BAS services' via delegated legislation.

You also advised that "the Act does not require that the specified service be related to those already covered in subsection 90-10(1)", and that the content of the subsection "does not itself limit the services that can be prescribed". The committee understands your position to be that there is nothing in subsection 90-10(1) (which only lists services related to Business Activity Statements) that limits the scope of the power in subsection 90-10(1A) to specify a service as a BAS service by delegated legislation.

From a scrutiny perspective, the committee is concerned that your response suggests that there is essentially no limit on the power of the Tax Practitioners Board to determine a BAS service under these provisions.

The committee's view is that statutory provisions must be read in context,¹ and that the terminology used in the provision of 'BAS services' and the context of subsection 90-10(1) indicates the limits on the power to specify a service as a 'BAS service'. In addition, the committee considers that, in general, delegated legislation can fill out the detail of an Act but not extend it. Where the power to extend the operation of an Act is claimed, then it would need to be clear that the enabling provision is a Henry VIII power. The committee's view is that does not seem to be the case in subsection 90-10(1A).

¹ As per *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, para [69].

The committee emphasises that a challenge to the validity of the instrument on the basis set out above may result in a court finding the instrument invalid. This could have significant consequences for persons acting in good faith under the instrument.

However, in accordance with the committee's past practice in circumstances where there is a difference of opinion about the validity of an instrument, the committee has resolved to conclude its examination of the instrument. In light of this, the committee has also resolved to withdraw the disallowance notice in place on this instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation