



Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009

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Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009

Date introduced: 24 June 2009

House: House of Representatives

Portfolio: Treasury

Commencement: Schedules 1 and 2 commence upon the commencement of Part 2 of the *Tax Agent Services Act 2009*¹. All other sections of the Bill commence on the day of Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The measures in this Bill form part of the reform of the current regulation of tax agents and provide a transition to the new law in the *Tax Agent Services Act 2009* (TAS Act) for the registration and regulation of tax agents and Business Activity Statement (BAS) agents. The Bill also deals with consequential matters arising from the enactment of the TAS Act.

Background

The Tax Agents Services Act 2009

The Tax Agent Services Bill 2008 was introduced into Parliament on 13 November 2008 and the *Tax Agent Services Act 2009* (TAS Act) received Royal Assent on 26 March 2009.

Briefly, the TAS Act established a national Tax Practitioners Board (TPB) as a statutory authority within the Australian Taxation Office (ATO); required certain entities that provide tax agent services and Business Activity Statement (BAS) services to be registered; introduced a Code of Professional Conduct to govern tax and BAS agents; provided for disciplinary sanctions to be imposed by the TPB; and replaced criminal penalties for certain misconduct by agents and unregistered entities with civil penalties and injunctions.

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1. This Act was assented to on 26 March 2009, and Parts 2 to 5 will commence by Proclamation. They cannot be proclaimed until this Bill receives Royal Assent.

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The provisions of the new legislation relating to the establishment of the TPB and appointment of the Chair and Board members, commenced on 26 March 2009.

The [Bills Digest](#) for the TAS Bill gives further background to the Bill as well as the measures it introduced.² Readers are also referred to the [Explanatory Memorandum](#) to the TAS Bill for a more detailed explanation of the measures.³ The TAS Bill was referred to the Senate Economics Committee on 26 November 2008 and its [report](#) was tabled in Parliament on 12 February 2009.⁴

According to the ATO [website](#) the key features of the TAS (Transitional Provisions and Consequential Amendments) Bill are:

- transitional arrangements to allow tax agents and nominees registered under the current law to transition smoothly into the new regulatory regime, and similarly allow certain entities to be taken as registered BAS agents under the new regime
- amendments to introduce two ‘safe harbour’ provisions, which constitute key features of the new regulatory regime. The safe harbour provisions exempt taxpayers who engage an agent from liability for an administrative penalty for certain mistakes and omissions where the error is solely due to the agent’s lack of reasonable care, and
- consequential amendments to existing legislation that will be necessary upon the enactment of the *Tax Agent Services Act 2009*, for example the repeal of the existing law relating to the registration of tax agents.⁵

Position of significant interest groups/press commentary

The TAS (Transitional Provisions and Consequential Amendments) Bill was released as an exposure draft on 3 April 2009, and a number of public [submissions](#) were made.⁶

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2. B Pule, *Tax Agents Services Bill 2008*, Bills digest, no. 64, 2008–09, Parliamentary Library, Canberra, 26 November 2008, viewed 5 August 2009, <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd064.pdf>
 3. Explanatory Memorandum, Tax Agents Services Bill 2008.
 4. Senate Standing Committee on Economics, *Tax Agents Services Bill 2008 [Provisions]*, final report, Commonwealth of Australia, February 2009, viewed 5 August 2009, http://www.aph.gov.au/senate/Committee/economics_ctte/tax_agents_09/report/index.htm
 5. Australian Government, ‘Tax agent services legislation’, ATO website, viewed 5 August 2009, <http://www.ato.gov.au/businesses/content.asp?doc=/content/00144430.htm&page=10&H10>
 6. Australian Government, ‘Submissions: exposure draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009’, The Treasury website, viewed 5 August 2009, <http://www.treasury.gov.au/contentitem.asp?ContentID=1514&NavID=037>

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The Commonwealth and Taxation Ombudsman was critical of some aspects of the proposed 'safe harbour' provisions in its [submission](#) to the exposure draft.⁷ While welcoming the principle of the provisions, the Ombudsman had some concerns about the penalty standards and possible problems in applying the measures fairly due to their interpretive nature; the lack of relief for taxpayers whose agent has defrauded them or been severely reckless, outside of civil proceedings; the evidentiary burden on taxpayers seeking relief under the provisions; and lack of clarity between different forms of default by agents and the taxpayer's culpability.

CPA Australia also [recommended](#) that certain safe harbour provisions be more expressly codified in the Bill, rather than being discretionary. It then published a second [submission](#) to highlight its disapproval of the 'excessive' transitional period for registration as a BAS agent, particularly because 'many current bookkeepers/BAS preparers will not currently have the requisite educational and professional qualifications necessary to adequately provide such services'.⁸

The Association of Accounting Technicians (AAT) raised similar concerns in its [submission](#) about the length of the transition period in which various categories of tax agents have to obtain necessary qualifications required under the TAS regime.

It is conceded there must be a reasonable time frame for the transition of current operatives into the new regime however, in AAT Australia's opinion that period should be as short as reasonably possible and two years is appropriate period. To protract the time frame to five years would result in the community being unnecessarily exposed to practitioners who have not proven the level of their competence and experience, a major prime mover for the legislation.⁹

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7. Commonwealth Ombudsman, *Commonwealth and Taxation Ombudsman's Comments on the Exposure Draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 and Explanatory Material*, submission to Treasury, 31 March 2009, viewed 5 August 2009, http://www.treasury.gov.au/documents/1514/PDF/Commonwealth_and_Taxation_Ombudsman.pdf
 8. CPA Australia, *Submission on the exposure draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 and explanatory material*, submission to Treasury, 25 March 2009, viewed 14 July 2009, http://www.treasury.gov.au/documents/1514/PDF/CPA_Australia.pdf; CPA Australia, *Supplementary submission on the exposure draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 and explanatory material*, submission to Treasury, 2 April 2009, p. 1, viewed 14 July 2009, http://www.treasury.gov.au/documents/1514/PDF/CPA_Australia_supplementary.pdf
 9. Association of Accounting Technicians, *Submission in response to the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 exposure draft*, submission to Treasury, 6 April 2009, p. 3, viewed 14 July 2009,

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The National Institute of Accountants called for further clarification in its [submission](#) on what a client is expected to supply when providing 'all relevant taxation information' and whether the onus is on the client to make sure all information has been supplied. It also sought further clarification on the term 'reasonable care' and on the application of the transitional periods.¹⁰

The Taxation Institute of Australia identified problems with the safe harbour provisions and proposed that they be amended so they are available:

- regardless of whether the fault of the agent is reckless or intentional
- regardless of whether the statement is made or lodged by the registered agent or the taxpayer
- for penalties that could be imposed under provisions dealing with 'no reasonably arguable position' and the failure to lodge documents on time.¹¹

The Institute of Chartered Accountants highlighted in its [submission](#) the need to clarify terms in the safe harbour provisions, and the application of the transitional provisions for registration.¹²

The Australian Association of Professional Bookkeepers (AAPB) raised concerns in its [submission](#) that the Bill does not adequately legislate for the bookkeeping profession and that bookkeeping cannot be properly covered because of the inclusion of section 251L(6) of the *Income Tax Assessment Act 1936* in the process for BAS agent registration.

AAPB rejects the recommended government transitional arrangements approach for registration for BAS Agents as the proposed transitional arrangements do not provide appropriate consumer protection to the client or the bookkeeper within the transitional

http://www.treasury.gov.au/documents/1514/PDF/Association_of_Accounting_Technicians.pdf

10. National Institute of Accountants, *Exposure draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009*, submission to Treasury, 27 March 2009, viewed 14 July 2009, http://www.treasury.gov.au/documents/1514/PDF/National_Institute_of_Australia.pdf
11. Taxation Institute of Australia, *Exposure draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2008*, submission to Treasury, 26 March 2009, viewed 14 July 2009, http://www.treasury.gov.au/documents/1514/PDF/Taxation_Institute_of_Australia.pdf
12. Institute of Chartered Accountants in Australia, *Submission on the exposure draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 and explanatory material*, submission to Treasury, 1 April 2009, viewed 14 July 2009, http://www.treasury.gov.au/documents/1514/PDF/The_Institute_of_Chartered_Accountants_in_Australia.pdf

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period nor does it meet the reasoning behind, why the Tax Agents Services Bill 2009 was introduced.¹³

The Australian Bookkeepers Network raised similar concerns in its [submission](#), and suggested that the drafting could lead to abuse of the system.¹⁴

The Bookkeeping Institute of Australia was also concerned about the lengthy transitional period in its [submission](#), but had additional concerns about the level of qualifications required to be a registered BAS agent. It argued that a Certificate IV in Financial Services (Accounting) is not an adequate qualification because it does not require the graduate to be competent in bookkeeping procedures or BAS tasks. The Bookkeeping Institute suggested that a Certificate IV in Financial Services (Bookkeeping) is a much more suitable qualification, or as a minimum standard the subject titled 'Carry out Business Activity and Instalment Activity Statement tasks' should be a required unit.¹⁵

In response to submissions to the exposure draft, the following changes are present in the Bill:

- access to the safe harbour provisions is restricted by an evidential burden
- civil penalty provisions under the *Taxation Administration Act 1953* are applied to the TAS Act
- minor wording amendments are made to the TAS Act
- notes throughout the Bill remind readers that a registered tax agent within the meaning of the TAS Act is registered under section 20-25 of the TAS Act
- entities providing tax agent services (other than BAS services) that were not required to be registered under the old law only have 3 months to notify the TPB (as opposed to 6 months in the exposure draft, which is still offered to providers of BAS services)

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13. Australian Association of Professional Bookkeepers Limited, *Submission regarding Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 ("The Transitional Provisions") and the explanatory material ("EM")*, media release, 25 March 2009, p. 5, viewed 14 July 2009, http://www.treasury.gov.au/documents/1514/PDF/Australian_Association_of_Professional_Bookkeepers_Limited.pdf
 14. Australian Bookkeepers Network, *Exposure draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 and explanatory material*, submission to Treasury, 26 March 2009, viewed 14 July 2009, http://www.treasury.gov.au/documents/1514/PDF/Australian_Bookkeepers_Network.pdf
 15. Bookkeeping Institute of Australia, *Exposure draft legislation to facilitate transition into the new tax agent services regime*, submission to Treasury, 24 March 2009, viewed 14 July 2009, http://www.treasury.gov.au/documents/1514/PDF/Bookkeeping_Institute_of_Australia.pdf

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- the TPB is able to grant an additional registration of 12 months to providers of BAS services who are registered under the 2 year transition period (rather than the additional registration of 3 years required by the TAS Act, thereby reducing the access to transitional provisions available to BAS service providers from 5 years to 3 years)
- the ability for taxpayers to recover fines etc. through legal proceedings is extended to fines incurred under the taxation laws (rather than just the *Income Tax Assessment Act 1936*).
- documents relating to the enforcement of Part VIIA of the *Income Tax Assessment Act 1936* in the custody of the Commissioner are no longer required to be handed over to the TPB, and
- notifications given to the TPB must be submitted in a form approved by the TPB in a way required by the TPB, and including any information required by the TPB.

Financial implications

According to the Explanatory Memorandum, there will be an unquantifiable cost to revenue because of the removal of certain administrative penalties under the safe harbour provisions.¹⁶

There will also be a compliance cost associated with the new regime which will be small for tax and BAS agents with the appropriate qualifications, but could be potentially large for individuals without the minimum qualifications who wish to seek registration as a BAS agent.¹⁷

Main provisions

The Bill has two Schedules, with Schedule 1 involving consequential amendments and Schedule 2 involving transitional amendments.

Schedule 1—Amendments

Part 1 of Schedule 1 amends, repeals or inserts relevant definitions of, and references to, a registered tax agent or BAS agent in the *A New Tax System (Goods and Services Tax) Act 1999*, the *Corporations Act 2001*, the *Fringe Benefits Tax Assessment Act 1986*, the *Income Tax Assessment Act 1936* (ITAA 1936), the *Income Tax Assessment Act 1997* (ITAA 1997), and the *Taxation Administration Act 1953* (TAA 1953) to ensure consistency with the TAS Act.

16. Explanatory Memorandum, *Tax Agents Services (Transitional Provisions and Consequential Amendments) Bill 2009*, p. 3.

17. *ibid.*

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Also, this Part repeals provisions in other Acts which will now be covered by the TAS Act, including:

- Part IX of the *Fringe Benefits Tax Assessment Act 1986* covering administrative penalties involving the preparation of fringe benefits tax returns (**item 3**)
- Part VIIA of the ITAA 1936 which is the current law governing the registration of tax agents being replaced by the framework contained in the TAS Act (**item 7**)
- section 214-185 of the ITAA 1997 covering registration requirements for persons giving a franking credit return or making an objection for the purposes of dealing with the imputation system (**item 8**), and
- section 214-130 of the *Income Tax (Transitional Provisions) Act 1997* covering the registration of tax agents in relation to the imputation system (**item 13**).

Additionally, Part 1 of Schedule 1 introduces ‘machinery’ amendments to the ITAA 1936, ITAA 1997, and the TAA 1953 to transfer the administration of the provisions relating to the registration of tax agents from the Commissioner of Taxation to the TPB, and to reflect the independence of the TPB from the Commissioner.¹⁸ Part 1 also expands the definition of ‘taxation law’ to include the TAS Act, and regulations made under it, by amending subsection 995-1(1) of the ITAA 1997 (**item 12**).

Safe harbour provisions

Items 23 and 24 of the Bill introduce two ‘safe harbour’ provisions into the TAA 1953. The **proposed new subsection 284-75(1A)** of the TAA 1953 is designed to ensure that taxpayers who engage a registered tax agent or BAS agent are not liable to an administrative penalty for making a false or misleading statement which results in a shortfall amount, if the statement was made by the agent and the shortfall amount was caused by the agent’s failure to take reasonable care.¹⁹ However, the provision will not apply if the agent intentionally disregards any tax law, or is reckless about the operation of any tax law, in making the relevant statement.

The **proposed new subsection 286-75(1A)** of the TAA 1953 is designed to ensure taxpayers who engage a registered tax agent or BAS agent are not liable to an administrative penalty for the failure to lodge a document where that failure arose from their agent’s failure to take reasonable care, or even if it arose despite the agent’s exercise of reasonable care.²⁰ Again, the provision will not apply if the agent intentionally disregards any tax law, or is reckless about the operation of any tax law, in making the relevant statement.

18. **Items 6, 18, 20, 21.**

19. See: Explanatory Memorandum, *Tax Agents Services (Transitional Provisions and Consequential Amendments) Bill 2009*, p. 18.

20. *ibid.*

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Both safe harbour provisions involve an evidentiary burden on the taxpayer to show they have provided the agent with all relevant taxation information (**new subsections 284-75(1B)** and **286-75(1B)**). This includes bringing the agent's attention to all accurate information the taxpayer would reasonably expect to be necessary in the provision of agent services, and answering accurately and completely in response to questions asked by the agent. The liability for penalties is not transferred from the taxpayer to the registered tax agent or BAS agent. If the error covered by these provisions occurs because of intentional disregard or recklessness by the agent, they may be referred by the Commissioner or the taxpayer to the Board.²¹

Part 2 of Schedule 1 amends the TAS Act to correct numbering and wording inconsistencies. It also amends section 70-40 to enable the TPB to disclose information to the Commissioner for the purposes of a civil penalty provision in the taxation law.

Schedule 2—Transitional provisions

Schedule 2 deals with the transitional arrangements for registration, references to things done by or in relation to a Tax Agents' Board, legal proceedings, and disclosure requirements.

Part 1 of Schedule 2 provides preliminary definitions including that 'Board' refers to the TPB (which replaces state Tax Agents' Boards), 'commencement' refers to the commencement of Part 1 of Schedule 1 to this Bill, 'new law' refers to the TAS Act, and 'old law' refers to Part VIIA of the ITAA 1936.

Part 2 provides for the continuation of existing registrations. **Item 2 of Schedule 2** allows for tax agents registered under the ITAA 1936 to be continued to be recognised as a registered tax agent until that registration would have expired under the old law, or until the entity's registration is terminated. It also continues suspensions under the old law, and allows for a suspended tax agent to be taken as a registered tax agent within the meaning of the new law after the period of suspension under the old law ends. **Item 3** provides for persons registered as a nominee of a tax agent under the old law to become a registered tax agent upon commencement of **Schedule 2**.

Item 4 provides a two year transitional period for providers of tax agent services (other than BAS services) who were not required to be registered under the ITAA 1936. This allows certain entities to be recognised as registered tax agents for two years to allow them to gain the necessary qualifications to register under the TAS Act. The entity must notify the TPB within 3 months of commencement and the TPB may impose conditions on the entity's registration and/or require them to have professional indemnity insurance. Under

21. *ibid.*, pp. 18, 24.

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item 5, if the entity was providing BAS services, they have 6 months to notify the TPB so they can access the same arrangements.

Part 3 of Schedule 2 deals with pending applications. It specifies that the TPB must decide on pending applications made under the old law for registration and re-registration as a tax agent, and registration or re-registration of a nominee, within six months of commencement (**items 6, 7, 8 and 9**). If the TPB does not decide on pending applications within this period, the applications are taken to have been rejected. Applicants seeking re-registration are regarded as registered tax agents until the 6 month period expires, or until the TPB makes its decision, whichever is the earlier.

Item 13 allows entities that were providing tax agent services (not BAS services) immediately prior to the TAS Act to make a new application to the TPB within six months of commencement without needing to satisfy the qualification and experience requirements if the TPB is satisfied they were providing services to a competent standard for a reasonable period. **Item 14** allows BAS service providers to make a similar application within a three year period after commencement. However, **subitem 14(2)** stipulates that if the applicant is a registered tax agent under the two year transitional period provided in **item 5 of Schedule 2**, then the TPB may approve a limited registration period of 12 months or more (rather than the minimum 3 year registration required by the TAS Act). This means BAS service providers can potentially be a registered BAS agent for three years before requiring the qualifications and experience set out in the TAS Act.

Part 4 of Schedule 2 stipulates that references to a Tax Agents' Board (which are currently state entities) in legislation and instruments shall be taken to be references to the TPB (which replaces Tax Agents' Boards under the TAS Act). It also requires the TPB to continue inquiries currently being managed by state Boards, and to make decisions on whether to investigate entities within 60 days of commencement.

Under **Part 5 of Schedule 2**, decisions by the TPB on applications for registration or re-registration, or suspension or cancellation can be reviewed through an application to the Administrative Appeals Tribunal.

Part 6 of Schedule 2 to the Bill provides for the transitional arrangements that relate to legal proceedings. **Item 19 of Schedule 2** provides that if any proceedings were pending in any court or tribunal immediately before commencement to which a state Board was a party, the TPB is substituted for the state Board, after commencement, as a party to the proceedings.

Part 7 of Schedule 2 applies the reporting and disclosure obligations of the TAS Act and transfers the custody of records from Tax Agents' Boards to the TPB.

Item 25 requires notifications given to the TPB to be submitted in a form approved by the TPB, in a way required by the TPB, and including any information required by the TPB. **Item 26** allows the Governor-General to make regulations in respect of Schedule 2

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matters, including matters of a transitional nature relating to amendments or repeals made by Schedule 1.

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