

# TREASURY SUBMISSION TO THE SENATE STANDING COMMITTEE ON ECONOMICS INQUIRY INTO THE TAX AGENT SERVICES BILL 2008

## OVERVIEW

The Tax Agent Services Bill 2008 (Bill) aims to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards.

The current regime for regulating tax agents appears in Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936) and was originally introduced in 1943. Although the rationale for the introduction of Part VIIA of the ITAA 1936 remains relevant today, changes in the tax environment in more recent years have prompted review.

Key changes to the tax system since 1943 include the introduction of self assessment and the expansion and modification of the tax base to include capital gains tax, the goods and services tax, fringe benefits tax and a large number of special regimes (including consolidation, the dividend imputation system, and separate rules for various trusts). A combination of changes in the tax and commercial environment has resulted in a significant growth in the use of tax agents over the last 20 years, with tax agents preparing and lodging around 74 per cent of individual tax returns and over 95 per cent of business tax returns.

Given this large percentage of taxpayers dependent on services provided by tax agents, it is imperative that the regulatory framework governing the provision of tax agent services promotes a high standard of services to consumers and provides for appropriate consumer protection.

For a detailed outline of the history of the regulatory reforms contained in the Bill, please refer to the Explanatory Memorandum associated with the Bill (in particular, Chapter 1: New legislative regime for the provision of tax agent services and Chapter 6: Regulation impact statement) and the Assistant Treasurer's media releases no. 039 and no. 099 of 2008 (available on the Assistant Treasurer's website).

## KEY ELEMENTS OF THE NEW LEGISLATIVE REGIME

### The establishment of a national Tax Practitioners Board

The Bill will establish a single national Tax Practitioners Board (Board) to replace the existing state-based Tax Agents' Boards. The Board will be an independent statutory body with the 'general administration' of the Bill, meaning that it will have the power to do all things necessary or convenient to be done in the exercise of its statutory functions and powers to further the goals of the Bill. (Currently, the Commissioner of Taxation (Commissioner) has the general administration of Part VIIA of the ITAA 1936 which provides for the registration of tax agents.)

The Board's key functions will be the registering and disciplining of tax agents and Business Activity Statement (BAS) agents, however it will also have certain powers to ensure that unregistered entities are not holding themselves out to be registered. The Board will be able to investigate matters and impose sanctions where appropriate. The Board will also have the power to initiate legal proceedings for certain offences in the *Taxation Administration Act 1953* (TAA 1953) that relate to the Bill.

Most of the Board's decisions will be reviewable by the Administrative Appeals Tribunal and the Board will be required to report annually to the Parliament.

## **Registration requirements — a wider scope of application**

Entities which provide tax agent services or BAS services (a narrower range of tax agent services relating to a BAS provision in the taxation laws) for a fee or other reward, who advertise the provision of such services, or who hold themselves out as being registered, will be required to register with the Board. (Currently, entities that provide certain services for a fee such as preparing or lodging a return on behalf of a taxpayer or giving advice about a taxation law on behalf of a taxpayer must register as a tax agent under Part VIIA of the ITAA 1936. Other entities such as bookkeepers and members of certain professional associations may provide BAS services in certain circumstances without being registered.)

There will be two types of registration, being tax agent registration and BAS agent registration.

The registration requirements for agents will consist of requirements related to character as well as minimum educational qualifications and relevant work experience. The requirements for registration as a tax agent will remain broadly similar to the requirements under the current law. BAS agents will have the same character tests, but will not be required to demonstrate the same degree of formal education and relevant experience as tax agents, reflecting the narrower scope of services that they may provide. In the case of partnerships and companies seeking registration, compliance with the requirements will be demonstrated by a sufficient number of registered individuals working for the organisation.

Entities which specialise in a particular area of the taxation laws or who only provide a single type of tax agent service (for example tax compliance work or advice rather than both) will be eligible to register, with scope to operate in their specialty. The Board may impose conditions on registration to limit the scope of the services that an agent may provide to a single area of the taxation laws or a single type of tax agent service. (These practitioners cannot typically register under the current law, due to their inability to demonstrate sufficient breadth of operating experience.)

## **The introduction of a Code of Professional Conduct**

A formal, legislated code of conduct has been a key aspect of the new legislative regime since its inception. The Code of Professional Conduct (Code) will govern the ethical and professional standards of registered tax agents and BAS agents. (Currently, only some tax agents are required to comply with a code of conduct by virtue of their membership of a professional association.) The Code is set out as a statement of principles and the Board may issue binding written guidelines for the application of the Code. The Board may enforce compliance with the Code by imposing sanctions for breaches.

## **A range of sanctions for breaches of the Code**

Under the Bill, if an agent breaches the Code, the Board has a range of options. The Board may caution the agent, require the agent to complete a course of training, subject the agent to practising restrictions, require the agent to practise under supervision, or suspend or terminate the agent's registration. (Currently, the state Tax Agents' Boards are only able to suspend or terminate registration.) Such a wide range of sanctions allows the Board to tailor its response to the severity of the misconduct.

## **Civil penalties and injunctions**

The existing scheme of offences and criminal penalties for certain misconduct by registered agents and unregistered entities will be replaced by civil penalties, consistent with the current conventions for framing penalties in Commonwealth legislation, which indicate that civil penalties are more

appropriate where the conduct being sanctioned is not serious enough to warrant a criminal conviction or imprisonment. There is, however, a need for monetary penalties to apply in some cases to deter prohibited conduct.

The Board may apply to the Federal Court of Australia for a civil penalty order against a registered agent if it makes a false or misleading statement, employs or uses the services of a deregistered entity, or signs a declaration in certain circumstances, or against an unregistered entity if it provides a tax agent service for a fee or other reward, advertises a tax agent service or represents that it is a registered agent.

The Board may also apply to the Federal Court of Australia for an injunction to prevent an entity from engaging in, or compel an entity to undertake, certain conduct.

### **Safe harbour from administrative penalty in certain circumstances**

A direct benefit of the tax agent services package for taxpayer clients is the proposed introduction of two 'safe harbours'. The safe harbours — one relating to the making of a false or misleading statement and the other relating to failure to lodge a document on time — exempt taxpayers from liability to an administrative penalty imposed by the Commissioner in certain circumstances, where the liability to an administrative penalty arises solely due to the carelessness of the taxpayer's agent.

The safe harbour provisions are proposed to be introduced in the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill, which is expected to be introduced into Parliament in 2009.

## **CONSULTATION HISTORY**

The details of the new regulatory framework and the draft legislation have evolved through extensive consultation with tax agents and bookkeepers, tax, accounting and legal professional associations and bookkeeper associations, representatives of community organisations, government departments and agencies including the Tax Office, the state Tax Agents' Boards and taxpayers. The key elements of the measure have received broad support throughout the consultation process.

Consultation on the regulatory reforms spanned the period from 1992 (when a working party was first established to review the regulatory arrangements and professional standards for tax agents) through to late 2008. In particular:

- confidential consultation on the proposed framework (including a Treasury discussion paper) was conducted in 2004 and 2005;
- confidential consultation on a first draft of legislation was conducted in 2006 and 2007;
- public consultation on an exposure draft package (including explanatory materials) was conducted in 2007; and
- public consultation on a revised exposure draft package was conducted in 2008.

### **Public consultations**

The exposure draft Tax Laws Amendment (Tax Agent Services) Bill 2007 and associated draft Regulations and explanatory materials were released for public consultation for 14 weeks from 9 May 2007 to 10 August 2007 and were followed by numerous consultation meetings with key

stakeholders. Treasury received 114 submissions in response to the exposure draft package, most of which expressed broad support for the proposed reforms.

A second round of public consultation was conducted on a revised exposure draft package for four weeks from 29 May 2008 to 27 June 2008. Treasury received 45 submissions in response to the revised exposure draft package, which overall expressed broad support for the revised package and acknowledgment of the issues addressed through the initial public consultation process in 2007.

### *Responses to key issues raised during public consultations*

The key amendments made following the public consultations are as follows.

- To enhance the independence of the Board from the Tax Office:
  - the exposure draft Bill was redrafted as a separate, stand alone Act, rather than part of the TAA 1953, to enhance the independence of the Board from the Tax Office; and
  - the Board (rather than the Commissioner) has been given the power to initiate criminal proceedings to enforce its investigative and information-gathering powers.
- Adjustments were made to the definitions of ‘tax agent service’ and ‘BAS service’ to:
  - ensure that only services which involve the application of a certain degree of knowledge and experience in interpreting the taxation law are included; and
  - allow financial services licensees to provide tax advice for a fee or other reward without being registered as a tax agent, provided that advice is not expected to be relied upon in satisfying a tax obligation.
- The wording of various principles in the Code, setting out the obligations of tax agents and BAS agents, has been clarified.
- An additional safe harbour has been included to protect taxpayers from an administrative penalty for failing to lodge a document on time and in the approved form where they engage a tax agent or BAS agent and they provide all necessary information to the agent to enable the agent to provide the document to the Commissioner on time and in the approved form, but the agent carelessly fails to do so.

## **OTHER MATTERS**

### **Associated legislation — the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill and the Tax Agent Services Regulations**

The Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill (transitional Bill) is currently in the process of being finalised and is expected to be introduced into the Parliament in 2009. The Tax Agent Services Regulations, which include the educational qualifications and relevant experience requirements for registration, are also yet to be finalised.

The transitional Bill includes provisions to enable the smooth transition from the current law regarding the registration of tax agents in Part VIIA of the ITAA 1936 to the regulatory framework proposed under the Bill. The transitional Bill proposes a two-year period for certain entities that will be required to register under the Bill but which are not currently regulated or required to register under the existing law.

The transitional Bill also contains consequential amendments to amend existing legislation to change definitions and references as a result of the Bill being enacted, and specifically includes amendments to the TAA 1953 to provide for the safe harbours for taxpayers from certain administrative penalties in certain circumstances.

### **Services provided by research and development consultants**

Since the Bill was introduced to Parliament on 13 November 2008, a number of entities engaged in consulting on research and development (R&D) for tax purposes have raised concerns with Treasury about the impact of the Bill on R&D consultants. The main issue relates to the question of whether the services provided by R&D consultants fall within the definition of 'tax agent services' and therefore whether such entities will be required to register as tax agents. Some R&D consultants have also expressed concern about whether they will be *able* to register as tax agents under the Bill, assuming they are so required.

The scope of the regulation proposed in the Bill is substantially the same as in the current law. Subsection 251L(1) in that Part contains a list of services for which unregistered entities are prohibited from charging a fee. The listed services include giving advice about a taxation law. As section 73B of the ITAA 1936, which contains provisions relating to the R&D tax concession, is a taxation law, an individual would need to be a registered tax agent under the current law in order to legally give advice about that section. Rather perversely however, the existing Regulations do not easily accommodate the registration of specialist service providers, such as R&D consultants. Under the existing Regulations, an individual is only able to register as a tax agent if they have formal qualifications in accounting and by demonstrating a broad range of relevant experience in preparing a variety of returns — this latter requirement often makes it impossible for true specialists in a narrow field to meet the experience requirements.

The new Bill regulates the provision of tax agent services as defined in section 90-5. A tax agent service includes a service that relates to ascertaining the entitlements of an entity that arise, or could arise, under a taxation law, or advising an entity about entitlements that arise, or could arise, under a taxation law. To be a tax agent service, the service must be provided in circumstances where the recipient can reasonably be expected to rely on the service to, for example, claim entitlements that arise, or could arise, under a taxation law.

Therefore, under the new arrangements if an R&D consultant provides advice about an entitlement under a taxation law, such as section 73B of the ITAA 1936, and it can reasonably be expected that the recipient of the advice will rely on the advice, then that R&D consultant will need to be registered as a tax agent under the Bill. However, unlike the present, the draft Regulations will contain educational qualifications and relevant work experience requirements that are sufficiently flexible to accommodate specialist service providers, such as R&D consultants.

As noted in paragraph 2.31 of the Explanatory Memorandum to the Bill, tax agent services only include those services that involve the application or interpretation of a taxation law and therefore require the provider to have a certain level of knowledge and experience in the taxation laws. It is therefore not expected that every type of service provided by an R&D consultant would be a tax agent service, and therefore not every R&D consultant would need to register.