

2009

EXPOSURE DRAFT

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TAX AGENT SERVICES (TRANSITIONAL  
PROVISIONS AND CONSEQUENTIAL  
AMENDMENTS) BILL 2009

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EXPLANATORY MATERIAL

(Circulated by the authority of the  
Treasurer, the Hon Wayne Swan MP)



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# **Glossary**

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The following abbreviations and acronyms are used throughout this explanatory material.

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
ATO	Australian Taxation Office
BAS	Business Activity Statement
Board	Tax Practitioners Board
Commissioner	Commissioner of Taxation
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
main Bill	Tax Agent Services Bill 2008
state Board	state Tax Agents' Board
TAA 1953	<i>Taxation Administration Act 1953</i>



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# **Chapter 1**

## ***Consequential amendments***

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### **Outline of chapter**

1.1 Items 1 to 21 in Schedule 1 to this exposure draft provide for the amendments to existing legislation that are necessary as a result of the enactment of the Tax Agent Services Bill 2008 (main Bill).

### **Context of amendments**

1.2 The new framework contained in the main Bill replaces the current law regarding the registration of tax agents.

1.3 As a consequence of the repeal of Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936) (the current law), certain references occurring in existing Acts, such as references to that Part and references to, and definitions of, 'tax agent' require amendment.

1.4 Other amendments are made to existing Acts to reflect changes associated with the transfer of the general administration of the provisions relating to the registration of tax agents from the Commissioner of Taxation (Commissioner) to the Tax Practitioners Board (Board).

### **Summary of new law**

- 1.5 The exposure draft:
- repeals provisions in the law that will no longer have any effect due to the enactment of the main Bill (such as Part VIIA of the ITAA 1936 regarding the registration of tax agents);
  - amends, repeals or inserts relevant definitions and references in other Acts to ensure consistency with the main Bill;
  - amends certain provisions in the *Taxation Administration Act 1953* (TAA 1953) to reflect the enhanced independence

of the Board from the Commissioner provided in the main Bill; and

- expands the definition of ‘taxation law’ to include the main Bill, once enacted, and associated regulations.

## **Detailed explanation of new law**

### **Amendment to the *A New Tax System (Goods and Services Tax) Act 1999***

1.6 The exposure draft repeals the definition of ‘registered tax agent’ in section 195-1 which is ‘as defined in Part VIIA of the ITAA 1936’, because Part VIIA will be repealed by the exposure draft. The term ‘registered tax agent’ is not used in the *A New Tax System (Goods and Services Tax) Act 1999*, and therefore no replacement definition is required. [*Schedule 1, item 1, section 195-1*]

### **Amendment to the *Corporations Act 2001***

1.7 The exposure draft replaces a reference in paragraph 766B(5)(c) to ‘tax agent registered under Part VIIA of the *Income Tax Assessment Act 1936*’ with a reference to ‘registered tax agent or BAS agent (within the meaning of the *Tax Agent Services Act 2009*’. The amendment updates the reference and maintains the same effect of the paragraph. [*Schedule 1, item 2, paragraph 766B(5)(c)*]

### **Amendments to the *Fringe Benefits Tax Assessment Act 1986***

1.8 The exposure draft repeals Part IX. Part IX provides for administrative penalties for:

- unregistered entities advertising to prepare fringe benefits tax returns; and
- tax agents that allow unregistered entities to prepare fringe benefits tax returns or conduct any business relating to fringe benefits tax returns on the tax agent’s behalf.

1.9 This Part will become redundant upon enactment of the main Bill because administrative penalties which cover services related to fringe benefits tax returns are contained in that Bill. [*Schedule 1, item 3, Part IX*]

1.10 The exposure draft repeals the definition of ‘registered tax agent’ in subsection 136(1), which is ‘as defined in Part VIIA of the

*Income Tax Assessment Act 1936*, and replaces it with a new definition of ‘registered tax agent’, which states that ‘registered tax agent has the meaning given by subsection 90-1(1) of the *Tax Agent Services Act 2009*’. These amendments update the reference and maintain the same effect of the definition. [Schedule 1, item 4, subsection 136(1)]

### **Amendments to the *Income Tax Assessment Act 1936***

1.11 The exposure draft repeals the definition of ‘registered tax agent’ in subsection 6(1), which ‘has the meaning given by section 251A’ of the ITAA 1936. Section 251A is in Part VIIA of the ITAA 1936 and will be repealed by the exposure draft. With the repeal of Part VIIA, all occurrences of the term ‘registered tax agent’ in the ITAA 1936 will be repealed. Therefore no replacement definition is required. [Schedule 1, item 5, subsection 6(1)]

1.12 The exposure draft amends paragraph 16(4)(b) to allow the Commissioner, or other person authorised by the Commissioner, to communicate information to a board, or a member of a board, for the purpose of the board performing its functions or exercising its powers under a taxation law. [Schedule 1, item 6, paragraph 16(4)(b)]

1.13 Currently, the Commissioner, or other person authorised by the Commissioner, may disclose taxpayer information to any board exercising any function under any Act administered by the Commissioner. The amendment is necessary to enable the Commissioner to disclose information to the Board in order for the Board to effectively perform its functions or exercise its powers under the main Bill. This is because, unlike the current state Tax Agents’ Boards, the Board will not be a board exercising a function under an Act administered by the Commissioner. It will, however, be a board performing functions or exercising powers under a taxation law as a result of other consequential amendments made by the exposure draft (see paragraph 1.20). For example, the amendment will allow the Commissioner to disclose information about unregistered entities, which may assist the Board in its new role monitoring and taking action against entities providing tax agent services for a fee without registration. This is a function that is currently performed by the Australian Taxation Office (ATO).

1.14 The amendment retains the existing scope of disclosures from the Commissioner to the Board.

1.15 The exposure draft repeals Part VIIA. Part VIIA contains the current law concerning the registration of tax agents. The new framework contained in the main Bill is intended to replace the current law concerning the registration of tax agents. [Schedule 1, item 7, Part VIIA]

### **Amendments to the *Income Tax Assessment Act 1997***

1.16 The exposure draft repeals section 214-185. The effect of section 214-185 is that persons giving a franking credit return or making an objection for the purposes of Part 3-6 (dealing with the imputation system) of the *Income Tax Assessment Act 1997* (ITAA 1997) are subject to the tax agent registration requirements in the current law. This section is no longer needed as those persons will be covered by the main Bill, given that the definition of ‘tax agent service’ in the main Bill includes ascertaining or advising on liabilities, obligations or entitlements under a taxation law. (The existing law applies to income tax-related services.) [Schedule 1, item 8, section 214-185]

1.17 The exposure draft replaces a reference to a ‘registered tax agent’ in the definition of ‘recognised tax adviser’ in subsection 995-1(1) with a reference to a ‘registered tax agent or BAS agent’, reflecting the broadening of the regulatory regime to include the regulation of entities providing Business Activity Statement (BAS) services for a fee or other reward as BAS agents. [Schedule 1, item 9, definition of recognised tax adviser in subsection 995-1(1)]

1.18 Consistent with this amendment, the exposure draft inserts a new definition of ‘registered tax agent or BAS agent’ which ‘has the same meaning as in the *Tax Agent Services Act 2009*’. [Schedule 1, item 11, subsection 995-1(1)]

1.19 The exposure draft also replaces the existing definition of ‘registered tax agent’ which is ‘as defined in Part VIIA of the *Income Tax Assessment Act 1936*’ with a definition stating that ‘registered tax agent has the meaning given by subsection 90-1(1) of the *Tax Agent Services Act 2009*’. [Schedule 1, item 10, definition of registered tax agent in subsection 995-1(1)]

1.20 ‘Taxation law’ is defined in subsection 995-1(1) of the ITAA 1997 to mean an Act of which the Commissioner has the general administration, or regulations made under such an Act. The exposure draft expands the definition of ‘taxation law’ to include, once enacted, the main Bill and regulations made under that Bill, despite the fact that the Board and not the Commissioner will have general administration of the main Bill. [Schedule 1, item 12, at the end of the definition of taxation law in subsection 995-1(1)]

### **Amendment to the *Income Tax (Transitional Provisions) Act 1997***

1.21 The exposure draft repeals section 214-130, which relates to the imputation system. Refer to paragraph 1.16 for an explanation of the rationale for this amendment. [Schedule 1, item 13, section 214-130]

## Amendments to the *Taxation Administration Act 1953*

1.22 The exposure draft inserts a new definition of the term ‘registered tax agent or BAS agent’ in subsection 2(1), which states that ‘registered tax agent or BAS agent has the same meaning as in the *Tax Agent Services Act 2009*’. This definition is required because of the amendments to paragraph 8AAZLH(2A)(b) and subsection 8J(2A) (explained in paragraphs 1.27 and 1.34, respectively) to make reference to ‘registered tax agent or BAS agent’. [*Schedule 1, item 14, subsection 2(1)*]

1.23 The exposure draft removes from the Commissioner’s reporting requirements in section 3B the requirement that the Commissioner report in his annual report information relating to sections 3D, 3E, 15 and 15A and Part III insofar as they apply in relation to the main Bill. [*Schedule 1, item 15, subsection 3B(1C)*]

1.24 Reporting on the working of these provisions insofar as they apply in relation to the main Bill will be included in an annual report required to be prepared by the Board under the main Bill.

1.25 In relation to the main Bill, sections 3D and 3E, Part III and sections 15 and 15A would cover information about the following:

- taxpayer information provided by the Board to certain law enforcement agencies and the Australian Crime Commission;
- prosecutions initiated by the Board in regard to offences relating to the main Bill (see paragraphs 1.28 to 1.33); and
- representations on behalf of the Board in certain proceedings and certification of documents by the Board (see paragraphs 1.35 and 1.42).

1.26 Section 3C governs the use and disclosure of taxpayer information obtained under or for the purposes of the TAA 1953. The exposure draft amends subsection 3C(1AB) to provide that section 3C does not apply in relation to information disclosed or obtained under or for the purposes of Part III (refer below) insofar as that Part applies to the main Bill, as the secrecy provisions applicable to the main Bill are contained in section 70-35 of that Bill. [*Schedule 1, item 16, subsection 3C(1AB)*]

1.27 The exposure draft replaces a reference to a ‘registered tax agent’ in paragraph 8AAZLH(2A)(b) with a reference to a ‘registered tax agent or BAS agent’, reflecting the broadening of the regulatory regime to include the regulation of entities providing BAS services for a fee or other reward as BAS agents. [*Schedule 1, item 17, paragraph 8AAZLH(2A)(b)*]

1.28 Part III contains prosecution and offence provisions. The exposure draft amends Part III to apply that Part in relation to the main Bill as if references (with certain exceptions) to the Commissioner, or an office of the Commissioner, were references to the Board. [*Schedule 1, item 18, section 8AC*]

1.29 The amendment allows the Board to initiate criminal proceedings for offences against certain provisions in Part III of the TAA 1953 that relate to the main Bill, rather than requiring it to rely on the Commissioner to commence such proceedings.

1.30 For the purposes of the main Bill, references to the Commissioner, or an office of the Commissioner, will be taken to be references to the Board with the exception of those provisions that:

- provide for an offence for failing to lodge an instrument with the Commissioner for assessment (paragraph 8C(1)(b)); or
- relate to the payment of money to the Commissioner (sections 8HA, 8W, 8WC, 8ZE, 8ZG and 8ZH).

1.31 These provisions are excepted because the Board's functions do not include receipt of instruments concerning assessment and the Board does not have the power to receive money on behalf of the Commonwealth. It is therefore appropriate for references to the Commissioner (or an office of the Commissioner) to be retained in relation to the main Bill in these circumstances.

1.32 References to the Commissioner in sections 8AB and 8AC which provide for the application of Part III to the *Development Allowance Authority Act 1992* and the main Bill, respectively, will also remain unchanged.

1.33 The amendment is consistent with the Board having the general administration of the main Bill and enhances the independence of the Board from the ATO.

### **Example 1.1**

The Board has requested that Allan appear before it in relation to an investigation that the Board is conducting.

At the investigation hearing, Allan refuses to answer a question posed by the Board and is therefore guilty of an offence under section 8D of the TAA 1953 for failing to answer questions when attending before the Board.

Rather than relying on the Commissioner to initiate criminal proceedings under section 8D of the TAA 1953, the Board has the power to initiate criminal proceedings against Allan in relation to the offence committed.

1.34 The exposure draft replaces a reference to a ‘registered tax agent’ in subsection 8J(2A) with a reference to a ‘registered tax agent or BAS agent’, reflecting the broadening of the regulatory regime to include the regulation of entities providing BAS services for a fee or other reward as BAS agents. *[Schedule 1, item 19, subsection 8J(2A)]*

1.35 Section 15 of the TAA 1953 specifies certain persons that are able to represent the Commissioner or an office of the Commissioner in any action, prosecution or other proceeding under, or arising out of, a taxation law and which is instituted by or on behalf of the Commissioner or an office of the Commissioner.

1.36 The exposure draft amends section 15 to apply that section in relation to the main Bill as if references to the Commissioner, or an office of the Commissioner, were references to the Board, and as if references to a Second Commissioner or to a Deputy Commissioner were omitted. *[Schedule 1, item 20, subsection 15(3)]*

1.37 The Board will therefore be able to be represented by certain persons in any action, prosecution or other proceeding under, or arising out of, a taxation law that relates to the main Bill. This will enable the efficient use of the Board’s resources.

1.38 The persons that may represent the Board are:

- a person enrolled as a barrister, solicitor, barrister and solicitor or legal practitioner of a federal court or of the Supreme Court of a State or Territory; and/or
- a person authorised by the Board, by instrument in writing, to appear.

1.39 This amendment is consistent with the Board having the general administration of the main Bill and enhances the independence of the Board from the ATO.

1.40 Section 15A of the TAA 1953 provides that the Commissioner may certify a copy or extract of a document obtained pursuant to a taxation law to be a true copy or true extract.

1.41 The exposure draft amends section 15A to apply that section in relation to the main Bill as if references to the Commissioner were references to the Chair of the Board. *[Schedule 1, item 21, subsection 15A(12)]*

1.42 This amendment will allow the Chair of the Board to certify a copy or extract of a document to be a true copy or extract, when the document is obtained by the Board pursuant to a taxation law that relates to the main Bill (eg, pursuant to section 8D of the TAA 1953). It would be inappropriate to require the Board to seek the Commissioner's certification of documents obtained pursuant to a taxation law that relates to the main Bill, particularly given the Board has the general administration of that Bill.

## **Commencement**

1.43 Schedules 1 and 2 to the exposure draft commence immediately after the commencement of Part 2 of the main Bill. Schedule 1 provides for the consequential amendments to be made following the enactment of the main Bill and Schedule 2 contains the provisions to allow a smooth transition from the existing law requiring the registration of tax agents in the current law to the new regulatory regime for the provision of tax agent services contained in the main Bill. *[Section 2]*

1.44 As outlined in the main Bill, Part 2 of that Bill will commence on a single day to be set by Proclamation. Proclamation must occur between the time this exposure draft (the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009) receives Royal Assent and the first day after the end of the nine-month period beginning from when this exposure draft receives Royal Assent.

1.45 This ensures that the key regulatory provisions in the main Bill (in Part 2 of that Bill) and the provisions contained in Schedules 1 and 2 to this exposure draft will commence concurrently.

1.46 The commencement of Schedules 1 and 2 to the exposure draft is referred to as 'commencement' throughout this explanatory material.

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## **Chapter 2**

# **Relief from certain administrative penalties for taxpayers who engage a tax agent or BAS agent**

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### **Outline of chapter**

2.1 Items 22 and 23 in Schedule 1 to this exposure draft amend the *Taxation Administration Act 1953* (TAA 1953) to provide for ‘safe harbours’ for taxpayers who engage a tax agent or a Business Activity Statement (BAS) agent. The safe harbours ensure that, in certain circumstances, taxpayers who engage a tax agent or a BAS agent are not liable to administrative penalties that ordinarily apply for making a false or misleading statement resulting in a shortfall amount, or for late lodgment.

2.2 Item 24 in Schedule 1 to the exposure draft sets out when the safe harbour provisions apply.

### **Context of amendments**

#### **Operation of current provisions**

##### *Penalty for false or misleading statement*

2.3 Subsection 284-75(1) of Schedule 1 to the TAA 1953 provides that a taxpayer is liable to an administrative penalty if they, or their agent, make a statement to the Commissioner of Taxation (Commissioner) that is false or misleading in a material particular, and this results in a shortfall amount.

2.4 A shortfall amount is the difference between the amount of tax, credit or payment entitlement calculated based on a taxpayer’s statement and the amount calculated in accordance with the law. A shortfall amount arises where the tax liability is less, or the credit or payment entitlement is more, than it would have been if the statement had not been false or misleading.

2.5 The amount of the administrative penalty is calculated by using the formula specified in section 284-85 of Schedule 1 to the TAA 1953, namely, the base penalty amount as worked out under section 284-90, adjusted upwards under section 284-220 for aggravating factors or downwards under section 284-225 for mitigating factors.

2.6 Section 284-90 of Schedule 1 to the TAA 1953 provides that the base penalty amount for subsection 284-75(1) is calculated as a percentage of the shortfall amount. The applicable percentage depends on whether the shortfall amount resulted from:

- intentional disregard of a taxation law by the taxpayer or their tax agent (item 1 of section 284-90);
- recklessness by the taxpayer or their tax agent as to the operation of a taxation law (item 2 of section 284-90); or
- failure by the taxpayer or their tax agent to take reasonable care to comply with a taxation law (item 3 of section 284 90).

2.7 As the penalty amount is comprised of factors dependent on not only a taxpayer's actions but also the actions of their tax agent, taxpayers are currently penalised for their own as well as their tax agent's carelessness in making a false or misleading statement which results in a shortfall amount.

#### ***Penalty for failure to lodge on time***

2.8 Subsection 286-75(1) of Schedule 1 to the TAA 1953 provides that a taxpayer is liable to an administrative penalty if they fail to give the Commissioner a return, notice, statement or other document on time and in an approved form.

2.9 The amount of administrative penalty is worked out using the formula specified in subsection 286-80(2) of Schedule 1 to the TAA 1953. Subsection 286-80(2) provides that the base penalty amount is calculated as one penalty unit for each period of 28 days, or part thereof, starting on the day the document is due and ending when the document is given to the Commissioner.

2.10 Under subsections 286-80(3) and (4), the base penalty amount is multiplied by two or five depending on the size of the entity (measured by the entity's withholding status, the entity's assessable income or the entity's annual turnover) at the time lodgment is required.

2.11 Currently, taxpayers are penalised for their tax agent's failure to lodge a document with the Commissioner in the approved form on time.

## **Rationale for changes**

2.12 With the introduction of self assessment, the burden of applying the taxation laws to individual circumstances was shifted in some respects from the Commissioner to taxpayers. Whilst it remains appropriate, even in a self assessing environment, for taxpayers to be responsible for deliberate or reckless acts (whether their own or their agent's), this exposure draft recognises that the simple failure to take reasonable care by an agent should not result in a monetary penalty for the taxpayer. Therefore the exposure draft provides that taxpayers who engage a tax agent or BAS agent and provide them with all relevant information are no longer penalised for the lack of reasonable care taken by their agent in making a false or misleading statement or lodging a document late. This approach is possible now that the new regulatory framework allows effective action to be taken to improve the performance of tax agents or BAS agents where necessary.

2.13 Taxpayers are not relieved from administrative penalties for their own or their tax agent's or BAS agent's recklessness or intentional disregard of the taxation law. Similarly, there are no exemptions from administrative penalties where tax avoidance schemes are involved. (Subdivision 284-C of Schedule 1 to the TAA 1953 provides for penalties relating to schemes.) However, in situations where:

- a taxpayer becomes liable for an administrative penalty for making a false or misleading statement; or
- a taxpayer becomes liable for an administrative penalty for failing to lodge a document on time and in the approved form; and
- liability for the penalty is due to the recklessness or intentional disregard of the law by their tax agent or BAS agent and through no fault of their own,

the Commissioner may remit all or part of the penalty (see section 298-20 of Schedule 1 to the TAA 1953). If the facts or reasonable inferences indicate that the taxpayer and the tax agent or the BAS agent colluded in making the false or misleading statement, remission of the penalty would not be appropriate.

## **Summary of new law**

2.14 A taxpayer who uses a tax agent or BAS agent will benefit from an exemption from administrative penalties in certain circumstances. Penalties will no longer apply:

- where a document (such as a return, notice or statement) is not lodged on time in the approved form due to the tax agent's or BAS agent's failure to take reasonable care, provided the taxpayer gave the agent the necessary information, in sufficient time, to lodge the document on time and in the approved form; and/or
- where a false or misleading statement is made to the Commissioner due to the tax agent or BAS agent failing to take reasonable care, provided the taxpayer has taken reasonable care to comply with their tax obligations by giving the agent the information necessary to make the statement.

2.15 These exemptions from administrative penalties will apply to statements required to be made, or to a return, notice, statement or other document required to be given, on or after the commencement of Schedule 1 to the exposure draft.

2.16 In situations where a shortfall amount arises due to a tax agent's or BAS agents' failure to take reasonable care, the agent may be referred by the Commissioner or the taxpayer to the Tax Practitioners Board (Board) for appropriate action. However, the applicability of the exemptions does not depend on the Board's decision whether or not to take action against an agent.

2.17 The introduction of these exemptions from administrative penalties does not affect taxpayers' ability to seek remission of any penalties from the Commissioner.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
By engaging a tax agent or BAS agent and providing them with all relevant information to enable the preparation and lodgment of a document with the Commissioner on time, taxpayers are not liable for an administrative penalty for late lodgment resulting from their agent's failure to take reasonable care.	Taxpayers are liable for an administrative penalty for their own and their tax agent's failure to lodge a document to the Commissioner in the approved form and by a particular day.
By engaging a tax agent or BAS agent and providing them with all relevant taxation information, taxpayers are not liable for an administrative penalty for making a false or misleading statement to the Commissioner that results from their tax agent or BAS agent failing to take reasonable care.	Taxpayers are liable for an administrative penalty for making a false or misleading statement to the Commissioner resulting from their own or their tax agent's lack of reasonable care.

## Detailed explanation of new law

### Safe harbour from an administrative penalty for making a false or misleading statement

2.18 Taxpayers are not liable to an administrative penalty for the making of a false or misleading statement to the Commissioner resulting in a shortfall amount due to their agent's lack of reasonable care, if they establish that they have provided their agent with all relevant taxation information and their agent makes the statement. [*Schedule 1, item 22, subsection 284-75(1A) of Schedule 1 to the TAA 1953*]

#### Example 2.1

George, a self-funded retiree, had interest bearing accounts with several different financial institutions. George kept all statements received from these financial institutions and provided these to Alex, a registered tax agent, who prepared and lodged his tax return.

When preparing George's tax return, Alex had relied entirely upon the statements provided by George. However, in calculating the interest income, Alex accidentally omitted a quarterly interest payment from one of the financial institutions.

After an audit was conducted on George's income tax return, it was found that George had a shortfall amount. However, as George had

provided Alex with all the relevant information he will not be liable for a shortfall penalty due to Alex's failure to take reasonable care. (Alex may, however, have breached the Code of Professional Conduct — refer to Chapter 3 of the explanatory memorandum to the main Bill.)

2.19 In order to demonstrate that they have provided all relevant taxation information to their tax agent or BAS agent, a taxpayer must:

- provide accurate and complete information in response to questions asked by their agent; and
- bring to the agent's attention all information which they would reasonably expect to be necessary to enable the provision of the tax agent service or BAS service correctly.

### **Example 2.2**

Stephen engages Maria, a registered BAS agent, to prepare his quarterly BAS. He provides Maria with details of income and expenditure for the quarter. Stephen confirms that he has provided all the relevant information that Maria requested and any other information that he could think of. Maria then prepares the BAS based on the information provided by Stephen. The BAS is signed by both parties and lodged with the Australian Taxation Office.

An audit reveals that cash receipts totalling \$10,000 have been omitted from the BAS resulting in a shortfall amount. Stephen went through the information that he provided to Maria and discovered he had forgotten to give the cash receipts to Maria. Because Stephen has not provided all relevant information to Maria, he is therefore liable for an administrative penalty for failing to take reasonable care when making a false or misleading statement resulting in a shortfall amount.

2.20 Where there is a dispute as to whether a taxpayer has provided all relevant taxation information to their tax agent or BAS agent, the Commissioner will consider the individual circumstances (consistent with such guiding documents as *The Taxpayers' Charter*).

### **Safe harbour from an administrative penalty for late lodgment of documents in the approved form**

2.21 Taxpayers are not liable to an administrative penalty for the late lodgment of a return, notice, statement or other document in the approved form if they establish that they have given all relevant information to enable their agent to lodge the document in the approved form to the Commissioner on time and the agent has failed to lodge the document.  
*[Schedule 1, item 23, subsection 286-75(1A) of Schedule 1 to the TAA 1953]*

### **Example 2.3**

Darney engages Rumi, a registered tax agent, to prepare her income tax return. Rumi asks for Darney's records to be provided by 15 November, and Darney provides her records by that day. Rumi prepares the return and posts it to Darney for signing. Darney signs the return and posts it back to Rumi within two days. Through an oversight in Rumi's office, the return is lodged late.

Darney did all things required in time to enable Rumi to lodge her return in the approved form by the due date. Because of this, and because the reason for late lodgment was a lack of reasonable care by the agent (in this case, an administrative oversight acknowledged by Rumi), Darney is not liable to any penalty.

2.22 Supplying all relevant information to enable the agent to lodge the document on time in an approved form includes meeting deadlines specified by the agent for the provision of relevant taxation information. 'Relevant information' also includes a signed document (where applicable).

### **Example 2.4**

Odilia engages Dylan, a registered tax agent, to prepare her income tax return. Dylan asks Odilia to provide her records by 15 November, and Odilia does so. Dylan prepares the return and posts it to Odilia to sign and return it within the following week. Odilia forgets to return her signed tax return until Dylan's office contacts her the day before the due date for lodgment. She returns the documents immediately, but the return was lodged after the due date.

Because Odilia has not provided all the information (including her signed declaration) to enable Dylan to lodge the return in time, the safe harbour would not relieve Odilia of an administrative penalty for failing to lodge her return on time.

If, however, Odilia had returned her signed tax return within the time frame specified by Dylan, and if her return was subsequently lodged late due to Dylan's lack of reasonable care. Odilia would be able to seek an exemption from the administrative penalty.

### **Example 2.5**

Ruhan, a registered tax agent, has prepared Peter's return in time for it to be lodged by the due date. In the process Ruhan has provided an opinion about the treatment of certain assets relevant to the preparation of Peter's income tax return with which Peter does not agree. Peter seeks a second opinion before agreeing to sign the return. Although Ruhan sought an extension to the due date for lodgment on Peter's behalf, Peter's enquiries still result in the return being lodged late.

The exemption will not apply in this case as the late lodgment of Peter's return is due to his own actions.

2.23 The safe harbour is available only where the late lodgment results from the tax agent's or BAS agent's failure to take reasonable care. For example, it is not available where the agent intentionally disregards a taxation law or is reckless as to the requirements of a taxation law.

#### **Example 2.6**

Lucas, a registered tax agent, has prepared Sofia's return in time for it to be lodged by the due date. However, the time taken to resolve a dispute between Lucas and Sofia regarding the return preparation fees has led to the return being lodged late.

In this case, Lucas's actions in withholding lodgment pending settlement of the dispute regarding fees constitutes intentional disregard of the lodgment obligation. Because the late lodgment is not due to Lucas's failure to take reasonable care, the safe harbour from penalty is not available to Sofia. Note however that Sofia could apply for remission of the penalty and Lucas may have breached the Code of Professional Conduct

#### **Example 2.7**

Courtney engages Davinford GST Specialists, a registered BAS agent, to prepare her BAS. Courtney provides all of her records two weeks before the due date for lodgment, as agreed with Davinford GST Specialists. Davinford GST Specialists has a large number of clients and experiences significant work pressures leading into key lodgment dates and is also in the process of moving its offices into larger premises. It does not post the prepared return to Courtney for signing until after the due date.

Courtney seeks safe harbour from administrative penalty for failing to lodge her return on time. Although the late lodgment was caused by Davinford GST Specialists, knowingly accepting too many clients and taking on an unmanageable workload, or adopting poor practice management practices does not constitute failure to take reasonable care by the agent.

2.24 If there is a dispute about whether or not the taxpayer provided all relevant information in time for the document to be lodged on time, the taxpayer will need to provide sufficient evidence to the Commissioner in order to obtain the safe harbour.

#### **Example 2.8**

Henry is a small business owner. He engages a registered tax agent, Hann Pty Ltd, to handle all tax related matters of his business

(including the preparation and lodgment of quarterly BASs and his annual income tax returns). Hann Pty Ltd has many clients and is therefore very busy, so it requests that Henry provides his business transaction records and any other required information on a quarterly basis within a week of each quarter's end. Henry complies with this request.

Henry receives a notice from the Commissioner imposing an administrative penalty for late lodgment of the final quarter's BAS as well as the annual income tax return for the previous year.

Henry writes to the Commissioner outlining his circumstances and seeking withdrawal of the penalty imposed. The Commissioner responds that, in order to obtain the safe harbour, Henry needs to demonstrate that the late lodgment was due to Hann Pty Ltd's failure to take reasonable care.

Henry approaches Hann Pty Ltd. Hann Pty Ltd admits that the paperwork relating to documents to be lodged for Henry at the end of the financial year was accidentally filed without being processed, and was only discovered after the due date for lodgment of the documents had passed. Hann Pty Ltd writes a statement to this effect for Henry to give to the Commissioner.

In this case, because the late lodgment was caused by Hann Pty Ltd failing to take reasonable care, and because Hann Pty Ltd admitted fault, the administrative penalty imposed on Henry for his failure to lodge documents on time may be withdrawn.

If, however, Hann Pty Ltd disputed Henry's assertion that he provided all relevant information on time and refused to admit that it had failed to take reasonable care in lodging the BAS and return, the safe harbour may not be granted. In these circumstances, Henry must provide other evidence to the Commissioner to prove that he provided all relevant taxation information in accordance with the timetable agreed with Hann Pty Ltd, for example, copies of relevant email correspondence with Hann Pty Ltd.

## **Application and transitional provisions**

2.25 The safe harbour from administrative penalty for failing to take reasonable care when making a false or misleading statement will apply in relation to statements that are required to be given on or after the commencement of Schedule 1 to the exposure draft. [*Schedule 1, subitem 24(1)*]

2.26 Similarly, the safe harbour from administrative penalty for late lodgment of a document in the approved form due to the tax agent's or BAS agent's failure to take reasonable care applies in relation to a return, notice, statement or other document required to be given on or after the commencement of Schedule 1 to the exposure draft. [*Schedule 1, subitem 24(2)*]

2.27 Refer to paragraphs 1.43 to 1.46 in Chapter 1 of this explanatory material for an explanation of the commencement date of Schedule 1 to the exposure draft.

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## **Chapter 3**

# ***Transitional arrangements for registration***

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### **Outline of chapter**

3.1 Part 1 of Schedule 2 to this exposure draft provides for the meanings of defined terms used in Schedule 2.

3.2 Part 2 of Schedule 2 to the exposure draft provides for the transitional arrangements for entities that are legally providing tax agent services as defined in the Tax Agent Services Bill 2008 (main Bill) before the commencement of that Bill.

3.3 Part 3 of Schedule 2 to the exposure draft provides for the transitional arrangements for entities that have applied for registration or re-registration under Part VIIA of the *Income Tax Assessment Act 1936* (the current law requiring the registration of tax agents (current law)) and the relevant state Tax Agents' Board (state Board) has not decided the application before the commencement of the main Bill.

3.4 Part 5 of Schedule 2 to the exposure draft provides that certain decisions of the Tax Practitioners Board (Board) related to registration are reviewable by the Administrative Appeals Tribunal (AAT).

### **Context of amendments**

3.5 As the current law will be repealed by the exposure draft (refer to paragraph 1.15 in Chapter 1 of this explanatory material), provision needs to be made to facilitate the transition of entities registered under the current law into the regulatory regime proposed by the main Bill. Likewise, provision needs to be made to allow entities that are currently legally providing tax agent services or Business Activity Statement (BAS) services (within the meaning of the main Bill) for a fee without registration to transition into the regime proposed by the main Bill.

3.6 Transitional provisions are also required to deal with applications for registration and re-registration that are on foot under the current law upon commencement.

## Summary of new law

3.7 Existing tax agent and nominee registrations will be deemed to be registrations under the main Bill and existing but undecided applications for registration that were lodged with a state Board will be decided in accordance with the current law by the Board.

3.8 Certain entities that are currently providing tax agent services for a fee legally without being registered or that otherwise satisfy the conditions for the provision of those services (because such services are not currently regulated) will also be transitioned into the regime under the main Bill.

3.9 Certain terms used in Schedule 2 to the exposure draft are defined in that Schedule. Other expressions used in Schedule 2 have the same meaning in that Schedule as in the main Bill or in the *Income Tax Assessment Act 1997*.

## Detailed explanation of new law

### Explanation of the use of defined terms in Schedule 2 to the exposure draft

3.10 An expression used in Schedule 2 to the exposure draft that is also used in the main Bill has the same meaning in Schedule 2 as it has in that Bill. Likewise, but subject to those expressions used in the main Bill, an expression used in Schedule 2 to the exposure draft that is also used in the *Income Tax Assessment Act 1997* has the same meaning in Schedule 2 as it has in that Act. [*Schedule 2, Part 1, subitems 1(2) and (3)*]

3.11 When the term **commencement** is used in Schedule 2 to the exposure draft, it means the commencement of Schedule 1 to the exposure draft. Refer to paragraphs 1.43 to 1.46 in Chapter 1 of this explanatory material for further explanation. [*Schedule 2, Part 1, subitem 1(1)*]

3.12 When the terms **old law** and **new law** are used in Schedule 2 to the exposure draft, they mean ‘Part VIIA of the *Income Tax Assessment Act 1936* as in force immediately before commencement’ and ‘the *Tax Agent Services Act 2009*’, respectively. [*Schedule 2, Part 1, subitem 1(1)*]

3.13 When the term **Board** is used in Schedule 2 to the exposure draft, it means the Board established under section 60-5 of the main Bill. [*Schedule 2, Part 1, subitem 1(1)*]

## Transition of entities providing tax agent services and BAS services

### *Continuation of existing registration of tax agents and nominees*

3.14 If, immediately before commencement (for an explanation of commencement, see paragraphs 1.43 to 1.46 in Chapter 1 of this explanatory material), an entity was a registered tax agent or registered nominee within the meaning of the current law, the entity is taken to be a registered tax agent under the main Bill. [*Schedule 2, Part 2, subitem 2(1) and item 3*]

3.15 This transitional provision allows existing registered tax agents and registered nominees to be transitioned into the new regulatory regime under the main Bill with minimal disruption to the provision of their services. It thereby ensures that such entities are able to continue to provide the services they were providing under the current law before commencement.

3.16 Registered nominees under the current law will be deemed to be registered tax agents under the main Bill, as that Bill does not make a distinction between ‘tax agent’ and ‘nominee’ registrations. The key difference in the current law between the two is the additional requirement that tax agents ‘carry on business’ as a tax agent. This requirement has been removed from the registration eligibility criteria in the main Bill.

3.17 Registered tax agents under the current law will be deemed to be registered tax agents under the main Bill, as the requirements for registration under the current law are not substantially different from the requirements for registration under that Bill, other than the removal of the ‘carry on business’ requirement. It is therefore appropriate that those entities that are registered under the current law be automatically transitioned into the regulatory regime under the main Bill.

3.18 An entity using this transitional provision is taken to be a registered tax agent under the main Bill for the period:

- beginning on commencement; and
- ending on the earliest of the following:
  - the day on which the entity’s registration would have expired under the current law, were it not repealed (refer to paragraph 1.15 in Chapter 1 of this explanatory material);
  - the day on which the entity’s registration is cancelled under the current law (refer to paragraph 3.23 for the

circumstances) (despite the repeal of the current law), where item 17 of Schedule 2 to the exposure draft applies and the Board decides to cancel the entity's registration (item 17 provides for the continuation of inquiries by a state Board — refer to paragraphs 4.19 to 4.29 in Chapter 4 of this explanatory material); and

- the day on which the entity's registration is terminated under Subdivision 30-B (termination for failure to comply with the Code of Professional Conduct) or 40-A (termination of registration on certain other grounds) of the main Bill.

(During the period when an entity is taken to be a registered tax agent after commencement, the Board may still suspend the entity under the main Bill.)

*[Schedule 2, Part 2, subitem 2(1) and item 3]*

### **Example 3.1**

If, immediately before commencement (which occurred on 1 January), Hayden was a registered tax agent whose registration was due to expire on 1 April, then from commencement, Hayden will be taken to be a registered tax agent within the meaning of the main Bill until 1 April (unless Hayden's registration is terminated prematurely).

Hayden will need to apply for renewal of his registration under, and in accordance with, the main Bill, which specifies that the application for renewal must be made at least 30 days before the day on which the registration expires. If Hayden makes an application for the renewal of his registration on 20 February, Hayden's registration will continue in accordance with the main Bill until a decision has been made by the Board.

3.19 If, immediately before commencement, an entity was taken *not* to be a registered tax agent within the meaning of the current law because its registration was suspended, the entity's registration is taken to have been suspended under section 30-25 (provisions regarding suspension) of the main Bill. *[Schedule 2, Part 2, subitem 2(2)]*

3.20 This means that, in accordance with subsection 30-25(4) in the main Bill, Part 2 (registration), Part 3 (the Code of Professional Conduct, including notifying about a change of circumstances) and Part 4 (termination of registration) apply to the suspended entity. Entities whose registration is suspended at commencement are therefore transitioned into the regime under the main Bill, even though they are not taken to be

registered tax agents or nominees (for most purposes) upon commencement.

3.21 Such an entity's registration is taken to be suspended under the main Bill for the period:

- beginning on commencement; and
- ending on the day on which the suspension would have ended under the current law, were it not repealed.

(During this period, the Board may still cancel or terminate the entity's registration and may impose a further period of suspension.)

*[Schedule 2, Part 2, subitem 2(2)]*

3.22 Once the period of suspension ends, the entity is taken to be a registered tax agent within the meaning of the main Bill for the period:

- beginning on the day immediately after the day on which the suspension ends; and
- ending on the earliest of the following:
  - the day on which the entity's registration would have expired under the current law, were it not repealed;
  - the day on which the entity's registration is cancelled under the current law, where item 17 of Schedule 2 to the exposure draft applies and the Board decides to cancel the entity's registration (item 17 refers to the continuation of inquiries by a state Board — refer to paragraphs 4.19 to 4.29 in Chapter 4 of this explanatory material); and
  - the day on which the entity's registration is terminated under Subdivision 30-B (termination for failure to comply with the Code of Professional Conduct) or 40-A (termination of registration on certain other grounds) of the main Bill.

*[Schedule 2, Part 2, subitem 2(3)]*

3.23 Under the current law, a state Board must suspend or cancel an entity's registration if the entity has been convicted of an offence against sections 8N, 8T or 8U of the *Taxation Administration Act 1953* (recklessly making a false or misleading statement, incorrectly keeping records or falsifying or concealing identity with the intention of deceiving or misleading), Division 136 or 137 of the Criminal Code (false or

misleading statements in applications or false or misleading information or documents) in relation to a taxation law, or an offence relating to those offences. A state Board may also suspend or cancel the registration of a registered tax agent for various reasons listed in subsection 251K(2) of the current law, for example, if the Board is satisfied that the tax agent has been guilty of misconduct as a tax agent or if the Board is satisfied that a return prepared by or on behalf of the tax agent is false in any material particular.

### **Example 3.2**

Before commencement (which occurred before 17 April), Sally was a registered tax agent, however her registration was suspended until 17 April in accordance with the current law, after she was found guilty of incorrectly keeping records with the intention of deceiving or misleading the Commissioner of Taxation (Commissioner).

Upon commencement, as Sally was suspended, Sally is taken to have been suspended under the main Bill. Sally's suspension under the main Bill will end on 17 April. After that time, Sally will be taken to be a registered tax agent under the main Bill until the original expiry date under the current law (unless Sally's registration is terminated before that time).

### ***Special rules for entities that are not currently required to register***

3.24 In recognition of the slightly different scope of services regulated by the main Bill, the exposure draft provides for transitional rules for certain entities that are currently providing certain types of services. These allow those entities providing services that are tax agent services or BAS services as defined in the main Bill, where registration is not required under the current law, to continue to provide those services.

#### ***Entities providing tax agent services (that are not BAS services)***

3.25 An entity that is not currently required to register to provide certain tax agent services (other than a BAS service within the meaning of the main Bill) for a fee will be taken to be a registered tax agent within the meaning of the main Bill for a period of two years beginning immediately after commencement, in certain circumstances. The entity:

- must have been providing a tax agent service, other than a BAS service within the meaning of section 90-10 of the main Bill, for a fee immediately before commencement; and
- must not have been required to register under the current law; and

- must notify the Board in writing that they are such a person within the six-month period beginning immediately after commencement.

*[Schedule 2, Part 2, subitem 4(1)]*

3.26 Such an entity is taken to be a registered tax agent for the two-year period beginning immediately after commencement, provided it assesses itself against the criteria and, if applicable, notifies the Board that it is an entity to which the transitional provision applies. Because the requirement is to notify, not to apply, the Board is not required to consider the notification. (The Board may, however, upon receiving a notification or subsequently, seek additional information from the entity or commence an investigation if it considers it necessary.) Notification will give the Board a record of those entities that are taken to be registered tax agents during the two-year period.

3.27 Refer to paragraphs 3.36 to 3.39 for the period and conditions of registration under this transitional provision.

*Individuals providing BAS services*

3.28 Under the current law only registered tax agents and certain persons listed in subsection 251L(6) and exempted from registration can provide BAS services for a fee.

3.29 A BAS service is defined under subsection 251L(7) of the current law as any of the following:

- preparing or lodging an approved form about a taxpayer's liabilities, obligations or entitlements under a BAS provision;
- giving advice about a BAS provision; or
- dealing with the Commissioner, or a person who is exercising powers or performing functions under a taxation law, in relation to a BAS provision.

3.30 Under subsection 995-1(1) of the *Income Tax Assessment Act 1997*, 'BAS provision' means:

- Part VII of the *Fringe Benefits Tax Assessment Act 1986*;
- the indirect tax laws; and
- Parts 2-5 and 2-10 on Schedule 1 to the *Taxation Administration Act 1953* (which are about the pay as you go system).

3.31 An individual who is providing BAS services within the meaning of subsection 251L(7) of the current law immediately before commencement, for a fee, but is currently exempt from the requirement to register because they are a person referred to in subsection 251L(6) of the current law will be taken to be a registered BAS agent within the meaning of the main Bill for a period of two years beginning immediately after commencement, in certain circumstances. The individual must notify the Board in writing within the six-month period beginning immediately after commencement that they are a person referred to in subsection 251L(6) of the current law who has been providing a BAS service within the meaning of subsection 251L(7). *[Schedule 2, Part 2, subitem 5(1)]*

### **Example 3.3**

Before commencement, Jordan is a bookkeeper working under the direction of a registered tax agent. Although he is providing BAS services for a fee, under subsection 251L(6) he is not required to register as a tax agent to provide BAS services. If Jordan notifies the Board in writing, within the six-month period after commencement, that he has been working as a bookkeeper under the direction of a registered tax agent to provide BAS services, he will be taken to be a registered BAS agent for the two-year period beginning immediately after commencement.

3.32 This transitional provision accommodates the differences between the current law and the main Bill regarding the regulation of the provision of BAS services as defined under the current law.

3.33 Individuals who are providing BAS services within the meaning of the main Bill (other than a BAS service within the meaning of subsection 251L(7) of the current law) for a fee immediately before commencement will also be taken to be a registered BAS agent within the meaning of the main Bill for a period of two years beginning immediately after commencement, in certain circumstances. The individual must notify the Board in writing within the six-month period beginning immediately after commencement that:

- they are *not* a person referred to in subsection 251L(6) of the current law who was providing BAS services within the meaning of subsection 251L(7); and
- they were providing, immediately before commencement, a BAS service within the meaning of the main Bill that was not a BAS service within the meaning of subsection 251L(7).

*[Schedule 2, Part 2, subitem 5(2)]*

3.34 This transitional provision accommodates the differences between the current law definition and the main Bill definition of 'BAS service'. The main Bill has a broader definition of 'BAS service' in that certain services that are not BAS services under the current law will become BAS services under the main Bill. Consequently, some individuals will need to register under the main Bill to continue to provide services that they currently provide, legally, without registration as a tax agent or without satisfying the conditions for exemption.

3.35 Whereas subsection 251L(7) of the current law defines a BAS service as outlined in paragraph 3.29, section 90-10 of the main Bill includes in the definition of 'BAS service' services relating to ascertaining liabilities, obligations and entitlements arising under a BAS provision (rather than merely preparing or lodging BAS forms about a taxpayer's liabilities, obligations or entitlements under a BAS provision).

#### **Example 3.4**

Alli completes calculations for her clients regarding the goods and services tax credits they can claim on the purchases they have made. She does not, however, prepare and lodge the BASs for her clients.

Preparing and lodging BASs falls within the scope of 'BAS services' defined in subsection 251L(7) of the current law. The services provided by Alli are not BAS services within that definition.

Although the provision of Alli's services is not regulated by the current law, Alli will be required to register under the main Bill in order to continue to provide her services for a fee. This is because she is providing a BAS service within the meaning of section 90-10 of the main Bill, namely services that relate to ascertaining clients' entitlements arising under a BAS provision.

If Alli notifies the Board in writing, within the six-month period after commencement, that she was unregistered but legally providing services that are now captured by the definition of BAS service in the main Bill, she will be taken to be a registered BAS agent for a two-year period commencing from commencement.

#### **Example 3.5**

Deaken is a bookkeeper and is providing BAS services for a fee to his clients without working under the direction of a tax agent, before the commencement time. Therefore, Deaken is illegally providing BAS services as he is not a registered tax agent and is not a person mentioned in subsection 251(6) of the current law.

Deaken is not a person that will be transitioned into the new regulatory framework under the main Bill as he is not legally providing

BAS services within the meaning of the main Bill immediately before commencement.

*Period and conditions of registration*

3.36 Entities taken to be a registered BAS agent or registered tax agent within the meaning of the main Bill are taken to be registered under section 20-25 of that Bill for a two-year period beginning immediately after commencement. At least 30 days before expiration of the two-year period, the entity will need to apply to the Board for renewal of its registration, and then registration will be taken to continue until the Board decides the application in accordance with section 20-50 of the main Bill. Refer also to paragraphs 3.56 to 3.65 for an explanation of further transitional provisions available to applicants for registration.

3.37 If an entity is taken to be registered as outlined in paragraphs 3.25 or 3.31, the Board may, in accordance with the main Bill, impose conditions to which the entity's registration is subject and/or require the entity to maintain professional indemnity insurance as if that entity had applied for registration and the Board had decided to grant the application. *[Schedule 2, Part 2, subitems 4(2) and 5(3)]*

3.38 A decision by the Board to impose conditions and a decision by the Board to require an entity to maintain professional indemnity insurance are reviewable by the AAT under section 70-10 of the main Bill, for which the entity can make an application to the AAT. Refer to paragraph 4.43 in Chapter 4 of this explanatory material. *[Schedule 2, Part 5, subparagraphs 18(2)(a)(i) and (ii) and 18(2)(b)(i) and (ii)]*

3.39 Entities taken to be registered tax agents by virtue of these transitional provisions will be subject to the Code of Professional Conduct and civil penalty provisions under the main Bill. This ensures that those transitioned into the regulatory regime under the main Bill are competent to provide tax agent services.

**Pending applications for registration and re-registration**

3.40 Broadly, decisions made by the Board regarding registration applications or re-registration applications that are on foot upon commencement are made in accordance with the current law. The time frames for making decisions are consistent with the main Bill.

***Tax agents and nominees***

3.41 Where an entity has applied for original registration as a tax agent or re-registration as a tax agent under the current law (section 251J or 251JB, respectively) and the relevant state Board has not

decided the application before commencement, then the Board must decide the application in accordance with the registration requirements in the current law (being section 251JA for original registration and section 251JC for re-registration). [*Schedule 2, Part 3, Division 1, paragraphs 6(1)(a) to (c) and 7(1)(a) to (c)*]

3.42 Sections 251JA and 251JC of the current law require companies and partnerships that apply for registration or re-registration to specify an original nominee of the entity. Given that, on commencement, all nominee registrations are taken to be registrations as a tax agent (refer to paragraph 3.10), in deciding an application in accordance with the current law, the Board will need to ensure that the original nominee specified in the application is a partner (in the case of a partnership application) or an employee (in the case of a company application) who is taken to be a registered tax agent on commencement.

3.43 Where an entity has applied for registration or re-registration of a nominee under the current law (section 251KB) and the relevant state Board has not decided the application before commencement, then the Board must decide the application in accordance with the nominee registration and re-registration requirements of the current law (being section 251KC). [*Schedule 2, Part 3, Division 1, paragraphs 8(1)(a) to (c) and 9(1)(a) to (c)*]

3.44 The Board must decide registration and re-registration applications for both tax agents and nominees within six months after commencement. This is consistent with the time limits for registration decisions under the main Bill and provides finality to those applications that are pending upon commencement. (The current law does not impose a time frame on registration decisions by the state Boards.) [*Schedule 2, Part 3, Division 1, paragraphs 6(1)(c), 7(1)(c), 8(1)(c) and 9(1)(c)*]

3.45 If the Board decides to grant the application for registration or re-registration in accordance with the current law, the Board:

- must register the entity or nominee (as appropriate) as a registered tax agent under section 20-25 of the main Bill;
  - In accordance with section 20-25, the Board may impose conditions to which the entity's registration is subject.
- must notify the entity and nominee (if appropriate) of its decision in accordance with section 20-30 of the main Bill; and
  - Under section 20-30 the Board must notify of its decision to grant registration within 30 days of its decision. Notification by the Board must be in writing and must

include the period of registration and any conditions to which the registration is subject.

- may require the entity or nominee (as appropriate) to maintain professional indemnity insurance in accordance with subsection 20-30(3) of the main Bill.

*[Schedule 2, Part 3, Division 1, paragraphs 6(1)(d), 7(1)(d), 8(1)(d) and 9(1)(d) and subitems 6(3), 7(3), 8(3) and 9(3)]*

3.46 If the Board decides to grant the registration, it is reasonable that the entity (and nominee, where appropriate) be notified in accordance with the main Bill. Notification under that Bill also ensures that the Commissioner is notified of the Board's decision.

3.47 If the Board decides to reject the application, the Board must notify the entity and nominee, where appropriate, of its decision in accordance with the current law as follows:

- for a registration decision — notification must be in accordance with subsection 251JA(3) (for tax agents) or 251KC(3) (for nominees) and section 251QB (regarding statements to accompany notification of decisions); and
- for a re-registration decision — notification must be in accordance with subsection 251JC(3) (for tax agents) or 251KC(3) (for nominees) and section 251QB.

*[Schedule 2, Part 3, Division 1, paragraphs 6(1)(e), 7(1)(e), 8(1)(e) and 9(1)(e)]*

3.48 Subsections 251JA(3), 251JC(3) and 251KC(3) require the Board to notify the entity in writing of the decision to reject the application and the reasons for that decision. Section 251QB requires the Board to include a statement in certain notices, including notices made under subsections 251JA(3), 251JC(3) and 251KC(3), stating that the entity has the right to make an application to the AAT for review of the decision, if it is dissatisfied with the decision.

3.49 The Board is taken to have rejected the application if it has not made its decision within six months after commencement. This is consistent with the approach adopted in the main Bill. *[Schedule 2, Part 3, Division 1, subitems 6(2), 7(2), 8(2) and 9(2)]*

*Additional rules for re-registration applications*

3.50 An entity whose application for re-registration is pending upon commencement is taken to be a registered tax agent for the period:

- beginning on commencement (for an explanation of ‘commencement’, see paragraphs 1.43 to 1.46 in Chapter 1 of this explanatory material); and
- ending on the earlier of:
  - the day on which the Board makes its decision regarding the application for re-registration; or
  - the day that occurs six months after commencement.

*[Schedule 2, Part 3, Division 1, subitems 7(4) and 9(4)]*

3.51 This approach is broadly consistent with the approach taken in subsection 251JC(4) of the current law, with the addition of a six-month limitation. Subsection 251JC(4) provides that in the case where a state Board decides to refuse a tax agent’s re-registration application and the notice of the refusal occurs after the date of the tax agent’s registration expiry, then the tax agent is taken to be registered for the period from expiry until the time of notification of the state Board’s decision. This additional rule for pending re-registration applications will ensure that entities will not be considered unregistered and hence have to cease providing services simply because they have not been notified by the Board of its decision.

3.52 Under the current law, entities seeking re-registration must normally make their application during the period 60 to 30 days before expiry. They may, however, request that a state Board allow them to make their application during the 30 days before the expiry date. If such a request has been made to a state Board under paragraph 251JB(4)(b) (for tax agents) or paragraph 251KB(4)(b) (for nominees) and the relevant state Board has not made a decision before commencement, then the Board must make a decision in accordance with section 251JB (in the case of tax agents) or 251KB (in the case of nominees) of the current law.

*[Schedule 2, Part 3, Division 1, subitems 7(5) and 9(5)]*

3.53 If the Board decides to allow such a request, the entity may apply for re-registration within the time decided by the Board. When the entity applies for re-registration, even though the main Bill will be in force, the entity is taken to have applied to a state Board for re-registration as if it had applied under the current law prior to commencement.

*[Schedule 2, Part 3, Division 1, paragraphs 7(5)(d) and 9(5)(d)]*

3.54 If the Board decides to refuse the request, the Board must notify the applicant (and specified nominee/s, in the case of a company or partnership application) in writing of the decision to refuse the request and the reasons for the decision in accordance with subsections 251JB(5) and 251KB(5) of the current law (which require the Board to provide a notice in writing that sets out its decision to refuse to allow a later time for the making of an application for re-registration and giving reasons for that decision). [*Schedule 2, Part 3, Division 1, paragraphs 7(5)(e) and 9(5)(e)*]

3.55 The notice must also include a statement informing the recipient/s of the notice that the Board's decision is reviewable by the AAT under section 251QB of the current law. Absence of this statement, however, does not affect the validity of the Board's decision. [*Schedule 2, Part 3, Division 1, paragraphs 7(5)(e) and 9(5)(e)*]

***Successor tax agents — changes in the constitution of a partnership***

3.56 Under the current law, when the constitution of a partnership (*original partnership*) changes, the registration of that partnership is terminated. The new partnership can apply to a state Board for a new registration as long as a partner of the new partnership was a partner, and a registered nominee, of the original partnership immediately before the termination, there is no partner who is an undischarged bankrupt and the registration of the original partnership was not suspended immediately before the termination.

3.57 In addition, under the current law a person who was a partner and a registered nominee of the original partnership immediately before the termination may apply to a state Board for registration as a tax agent, provided that partner is not an undischarged bankrupt.

3.58 The treatment of partnerships under the main Bill is quite different. Under that Bill, if the constitution of a partnership changes, the registration of that partnership is not terminated. Therefore a change in the constitution of a partnership does not affect the continuity of that partnership's registration. Under the main Bill, a registered partnership must notify the Board within 30 days of the day on which the partnership becomes, or ought to have become, aware that the composition of the partnership changed.

3.59 The following paragraphs explain provisions relating to situations where:

- a partnership's registration terminated before commencement because of a change in constitution but a decision had not yet been made by a state Board before commencement; and

- a partnership's registration terminated before commencement and it made an initial application for successor registration but that application was rejected by a state Board before commencement.

3.60 In addition, provision is made for the situation where a partnership's registration terminated and an application had not been made by the new partnership or by a partner before commencement. This is explained in paragraphs 3.66 to 3.69.

*Partnership registration terminated and decision not made by state Board before commencement*

3.61 If the registration of a partnership was terminated under the current law because there was a change in the constitution of the partnership and, at commencement:

- a person mentioned in paragraph 3.57 or a new partnership mentioned in paragraph 3.56 had applied to a state Board for registration as a tax agent in accordance with subsection 251JE(1) or 251JE(2) of the current law, as appropriate; and
- the relevant state Board had not yet registered the person or new partnership under section 251JF of the current law,

then, despite section 251JD of the current law (termination because of a change in partnership), the original partnership's registration is taken not have been terminated at the time of the change in the constitution of the original partnership. [*Schedule 2, Part 3, Division 1, subitems 10(1) and (2)*]

3.62 Because the original partnership's registration will be taken not to have terminated, the transitional arrangements described in paragraph 3.14 will apply to the partnership and its nominee/s.

*Partnership registration terminated and first application rejected by state Board before commencement*

3.63 Under the current law, certain time limits and special provisions apply to the making of applications for registration as a successor tax agent following termination of registration due to a change in the constitution of a partnership. Broadly speaking, an application must be made within 30 days after the original partnership's registration terminated. If a state Board is of the opinion that the application made is not in accordance with the requirements in the current law, and the notice of that opinion is given, at the earliest, 21 days after termination of the original partnership's registration, then the applicant has a further period

of seven days (under subsection 251JE(9)) in which to resubmit its application. Because of the changed approach to the continuity of partnerships (and therefore partnership registration in the case of a change in constitution), under the main Bill, transitional provisions are required to accommodate situations where commencement occurs during the 30-day period or during the subsequent seven-day period granted by a state Board.

3.64 In situations where the seven-day period for resubmitting an application under subsection 251JE(9) of the current law has not expired at commencement, the applicant may resubmit its application for registration as a successor tax agent in accordance with section 251JE within seven days after commencement. The applicant may do so where:

- a state Board received a document from the entity purporting to be an application made in accordance with section 251JE of the current law (application for registration as a successor tax agent);
- the state Board was of the opinion that the document was not an application made in accordance with 251JE and notified the entity of that opinion before commencement in accordance with subsection 251JE(8);
- the seven-day period mentioned in subsection 251JE(9) has not expired at commencement; and
- the entity has not yet re-made an application under section 251JE as allowed by subsection 251JE(9).

*[Schedule 2, Part 3, Division 1, paragraphs 10(3)(a) to (e)]*

3.65 If the Board is of the opinion that the entity has applied in accordance with section 251JE of the current law, the Board:

- must register the entity as a registered tax agent under section 20-25 of the main Bill;
- must notify the entity of its decision in accordance with section 20-30 of that Bill; and
- may impose conditions to which the entity's registration is subject and/or require the entity to maintain professional indemnity insurance in accordance with that Bill.

*[Schedule 2, Part 3, Division 1, paragraph 10(3)(f) and subitem 10(4)]*

### Example 3.6

Before commencement, Billy is a partner and a registered nominee of a partnership, YUU & Partners, which is a registered tax agent under the current law. YUU & Partners' registration is terminated because the constitution of the partnership changes.

Within the required timeframe in the current law, Billy submits an application to a state Board for registration as a successor tax agent. Billy was notified by the state Board that it was of the opinion that the document submitted by Billy was not an application made in accordance with section 251JE of the current law. Three days later, the main Bill commenced.

Billy had not re-made his application for registration as a successor tax agent before commencement. Under the exposure draft, Billy has seven days from commencement to re-submit his application for registration as a successor tax agent to the Board.

### Application not yet made

#### *Successor tax agents — changes in the constitution of a partnership*

##### *Partnership registration terminated and application not made before commencement*

3.66 If the registration of a partnership was terminated under the current law because there was a change in the constitution of the partnership and, at commencement:

- a person mentioned in paragraph 3.57 or a new partnership mentioned in paragraph 3.56 had not applied to a state Board for registration as a tax agent in accordance with subsection 251JE(1) or 251JE(2) of the current law, as appropriate; and
- the 30-day period within which an application had to be made (as mentioned in subsection 251JE(4) of the current law) had not expired,

then, despite the repeal of the current law, the person or new partnership may apply to the Board in accordance with subsection 251JE(1) or 251JE(2) of the current law, as appropriate, within the balance of the 30-day period. [*Schedule 2, Part 3, Division 2, subitems 12(1) and (3)*]

3.67 If a person or the new partnership makes such an application, then despite section 251JD of the current law (termination because of a change in partnership), the original partnership's registration is taken not

to have been terminated at the time of the change in the constitution of the original partnership. [*Schedule 2, Part 3, Division 2, subitems 12(2) and (4)*]

3.68 These provisions ensure that a person or new partnership retains the ability to make an application to the Board for successor registration under the current law where the 30-day period for making such an application has not expired, notwithstanding the repeal of the current law from commencement. A person or new partnership will have the time from commencement until the 30-day period would have expired under the current law to apply to the Board.

3.69 Provided an application is made which complies with the requirements in subsection 251JE(1) or 251JE(2), as appropriate, the original partnership's registration will be taken not to have terminated and the transitional arrangements described in paragraph 3.14 will apply to both the partnership and its nominee/s.

## **New applications**

3.70 The exposure draft also provides additional (or alternative) transitional arrangements for new applications for registration as a tax agent or as a BAS agent to facilitate the registration of certain entities that are not registered under the current law or do not satisfy the registration requirements under the current law but nevertheless have extensive experience in their specialised field.

### ***Registration as a tax agent***

3.71 Entities seeking registration as a tax agent will benefit from a six-month period during which they can apply for registration without meeting the educational qualifications and relevant work experience requirements to be prescribed by regulations provided certain conditions are met.

3.72 Despite paragraphs 20-5(1)(b) (which requires the Board to be satisfied that an individual applicant meets the requirements prescribed by regulations), 20-5(2)(c) (which relates to a partnership having a sufficient number of registered individuals) and 20-5(3)(d) (which relates to a company having a sufficient number of registered individuals) of the main Bill, an entity will be eligible for registration if:

- the entity applies for registration as a registered tax agent under section 20-20 of the main Bill before the end of the six-month period beginning immediately after commencement;

- the entity would be eligible for registration but for the operation of paragraph 20-5(1)(b), 20-5(2)(c) or 20-5(3)(d), as appropriate;
- immediately before commencement, the entity was providing a tax agent service within a particular area of the taxation laws; and
- the Board is satisfied that the entity has been providing that tax agent service to a competent standard for a reasonable period before making the application.

*[Schedule 2, Part 2, Division 3, subitem 13(1)]*

3.73 This provision accommodates entities that are providing a tax agent service within a particular area of the taxation laws but are not registered under the current law, such as, for example, certain specialists who have been unable to register as a tax agent under the current law due to the restrictive registration requirements but who are nonetheless qualified and competent in their specialised field.

3.74 An entity that has made such an application is taken to be a registered tax agent within the meaning of the main Bill for the period:

- beginning on commencement; and
- ending immediately before the day on which the Board makes a decision under section 20-25 of the main Bill.

*[Schedule 2, Part 2, Division 3, subitem 13(2)]*

3.75 This provision allows the entity to continue to provide the tax agent service from commencement of the main Bill to the time that the Board makes a decision to grant or reject the application.

3.76 Refer to paragraphs 3.79 to 3.82 for an explanation of the period and effect of registration.

***Registration as a BAS agent***

3.77 Individuals seeking registration as a BAS agent will benefit from a three-year period during which they can apply for registration without meeting the educational qualifications and relevant work experience requirements to be prescribed by regulations provided certain conditions are met.

3.78 Despite paragraph 20-5(1)(b) of the main Bill, which requires the Board to be satisfied that the individual meets the requirements prescribed by regulations, an individual will be eligible for registration if:

- the individual applies for registration as a registered BAS agent under section 20-20 of the main Bill before the end of the three-year period beginning immediately after commencement;
- the individual would be eligible for registration but for the operation of paragraph 20-5(1)(b); and
- the Board is satisfied that the individual has been providing BAS services to a competent standard for a reasonable period before making the application.

*[Schedule 2, Part 2, Division 3, item 14]*

***Period and effect of registration***

3.79 Once the Board makes a decision to grant registration, that registration is granted under the main Bill, and is therefore for a period of at least three years as determined by the Board.

3.80 Entities that wish to take advantage of these transitional arrangements will have to demonstrate to the Board that they satisfy the criteria outlined above, in particular that they have been providing tax agent services or BAS services to a competent standard for a reasonable period before making the application. What constitutes a ‘reasonable period’ will be determined by the Board.

3.81 The transitional arrangements allow entities taken to be registered agents under the main Bill the opportunity to register without initially meeting the relevant experience and educational qualification criteria, and gives them sufficient time to obtain the necessary qualifications and/or experience in order to meet all of the registration requirements at the time of renewal.

3.82 This transitional arrangement, when coupled with the two-year transitional period explained from paragraph 3.24, effectively gives certain entities up to approximately five years to obtain the educational qualifications and relevant experience required to meet the requirements for renewal of registration.

### **Example 3.7**

On commencement, Tony is taken to be a registered BAS agent under the main Bill for a period of two years. Before the end of the two-year period after commencement, Tony applies to the Board for registration as a registered BAS agent, although he does not meet the educational qualifications and relevant experience requirements for registration.

Despite not meeting the education qualifications and relevant experience requirements for registration, Tony will be eligible for registration if the Board is satisfied that he has been providing BAS services competently for a reasonable period. If the Board is satisfied that Tony has been providing services competently for a reasonable period, Tony will be registered as a BAS agent under the main Bill for a minimum of three years.

In this situation, Tony will have at least five years from commencement to transition into the main Bill and obtain the educational qualifications and relevant experience requirements.

### **Refund of lodgment fees in certain circumstances**

3.83 If an application is made under certain sections of the current law, being sections 251J, 251JB or 251KB (applications for registration and re-registration of tax agents and nominees) and the applicant withdraws the application after commencement but before a decision is made by the Board in regard to their application, then the Commissioner is required to refund the lodgment fees paid under the current law, to the applicant. [*Schedule 2, Part 3, Division 1, item 11*]

3.84 This saves the current law so it can be applied to registration applications that have been made but not decided before commencement, and those new or pending applications that are made under the current law after commencement. (Although a similar provision exists in the main Bill, it applies only to applications made under that Bill.)



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## **Chapter 4**

# ***Transition of the state Tax Agents' Boards to the Tax Practitioners Board***

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### **Outline of chapter**

4.1 Part 4 of Schedule 2 to the exposure draft provides for the transitional arrangements regarding the references to, and things done by, or in relation to, a Tax Agents' Board (state Board) under Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936) (current law).

4.2 Part 5 of Schedule 2 to the exposure draft provides for the transitional arrangements regarding the review of decisions of the state Boards and transitional decisions of the Tax Practitioners Board (Board) by the Administrative Appeal Tribunal (AAT).

4.3 Part 6 of Schedule 2 to the exposure draft provides for the transitional arrangements that relate to legal proceedings.

4.4 Part 7 of Schedule 2 to the exposure draft provides for the reporting and disclosure obligations and the transfer of custody of records from the state Boards and the Commissioner of Taxation (Commissioner) to the Board.

4.5 Part 8 of Schedule 2 to the exposure draft provides for the making of transitional regulations by the Governor-General to carry out or give effect to matters of a transitional nature.

### **Context of amendments**

4.6 Currently there are six state-based Boards that register tax agents and administer the current law regarding the registration and regulation of tax agents.

4.7 The Tax Agent Services Bill 2008 (main Bill) introduces a new regulatory regime and establishes a national Board to replace the state Boards. The Board will have the general administration of the main Bill, a function which is currently performed (in respect of Part VIIA of the ITAA 1936) by the Commissioner.

4.8 This exposure draft provides for the transition of the state Boards under the current law to the Board under the main Bill.

## **Summary of new law**

4.9 The Board will take the place of the current state Boards. This means that:

- things done by the state Boards will become things done by the Board;
- references to a state Board in an instrument will be taken to be a reference to the Board;
- inquiries by a state Board will be considered by the Board, and evidence, information or documents required to be given to a state Board will be required to be given to the Board;
- the Board will step into the shoes of the state Boards in any pending legal proceedings; and
- records in the custody of the state Boards and certain records in the custody of the Commissioner will be transferred to the custody of the Board.

4.10 Despite the repeal of the current law and the consequent dissolution of the state Boards upon commencement of Schedule 1 and Schedule 2 to the exposure draft (as explained in paragraph 1.43 to 1.46 in Chapter 1 of this explanatory material), a right to review of a decision by a state Board under the current law will remain available after commencement. In addition, a right to review of a decision will be available where a decision that would otherwise have been made by a state Board is made after commencement by the Board under the exposure draft.

4.11 Regulations may be made prescribing certain matters related to Schedule 2 to the exposure draft and matters of a transitional nature relating to the amendments or repeals made by Schedule 1 to the exposure draft.

## Detailed explanation of new law

### Definition of 'Board'

4.12 As described in paragraph 3.13 in Chapter 3 of this explanatory material, **Board** is defined in Schedule 2 to the exposure draft as the Tax Practitioners Board established under section 60-5 of the main Bill. *[Schedule 2, Part 1, subitem 1(1)]*

### References to and things done by or in relation to a Tax Agents' Board

#### *Things done by or in relation to a Tax Agents' Board*

4.13 If a thing was done by, or in relation to, a state Board under the current law, then after commencement, for the purposes of the operation of any law, the thing is taken to have been done by, or in relation to, the Board. A thing done includes the making of an instrument. *[Schedule 2, Part 4, subitems 15(1) and (3)]*

4.14 Among other things, this provision allows the Board to step into the shoes of a state Board for the purpose of appealing an adverse decision made against a state Board.

#### **Example 4.1**

Before commencement, ZYX Tax Services Ltd, a tax agent, seeks review by the AAT of a decision of a state Board to cancel its registration. The AAT decides to set aside the state Board's decision to cancel ZYX Tax Services Ltd's registration and substitutes a decision that ZYX Tax Services Ltd's registration not be cancelled.

The Tax Agent Services Bill 2008 is enacted shortly thereafter. Following commencement, the Board decides to appeal the decision of the AAT to the Federal Court of Australia. The Board is able to appeal to the Federal Court because the Board is able to step into the shoes of the state Boards and, had the current law not been repealed upon commencement, the state Board would have been able to lodge such an appeal.

4.15 Despite this general rule, the Minister (being a Treasury-portfolio Minister) may, by writing, determine that a particular thing done by, or in relation to, a state Board is not to be taken to have been done by or in relation to the Board. That is, the Minister may determine that the general rule does not apply in relation to a specified thing done by a state Board. This provides flexibility for the Minister to ensure that the appropriate outcome is achieved in all circumstances. *[Schedule 2, Part 4, subitem 15(2)]*

4.16 The exposure draft specifies that a determination by the Minister is not a legislative instrument, because it is not an instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is included in the exposure draft merely to assist readers. *[Schedule 2, Part 4, subitem 15(4)]*

***References in instruments to a Tax Agents' Board***

4.17 If an instrument contains a reference to a state Board and the instrument is in force immediately before commencement, then after commencement the instrument has effect as if the reference to the state Board were instead a reference to the Board. *[Schedule 2, Part 4, subitem 16(1)]*

4.18 Similar to above, the Minister may, by writing, determine that this general rule does not apply in relation to a specified reference to a state Board. To assist readers, the exposure draft specifies that any such determination is not a legislative instrument, because it is not an instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. *[Schedule 2, Part 4, subitems 16(2) and (3)]*

***Continuation of inquiries by a Tax Agents' Board***

4.19 If a state Board had given an entity a 'show cause notice' before commencement, then the Board must make a decision within 60 days after commencement as to whether or not to investigate the entity under the main Bill. *[Schedule 2, Part 4, paragraph 17(1)(a)]*

4.20 A ***show cause notice*** means a written notice to an entity that:

- sets out the grounds on which the state Board is giving the notice;
  - In setting out the grounds on which the notice is given, the notice may include, for example, a reference to the legislative provisions relevant to the grounds.
- invites the entity to respond in writing to the state Board addressing the grounds on which the notice has been given; and
- states the period within which the entity must give the written response to the state Board.

*[Schedule 2, Part 4, subitem 17(5)]*

4.21 If the Board decides to commence an investigation under the main Bill, then it must:

- notify the entity in accordance with section 60-95 of the main Bill. This section provides that the notice must be in writing and must be given within two weeks after the decision to investigate is made;
- carry out its investigation in accordance with the process required or allowed by Subdivision 60-E of the main Bill as if the Board were investigating conduct that may breach that Bill. Subdivision 60-E provides for such things as the collection of evidence by the Board, the period during which a decision must be made following an investigation and the notification requirements; and
- take whatever action in relation to the entity as is allowed by the current law (despite its repeal by Schedule 1 to this exposure draft) and as the Board considers appropriate.

*[Schedule 2, Part 4, paragraph 17(1)(b)]*

4.22 Although the Board must carry out its investigations in such circumstances in accordance with the process required or allowed by Subdivision 60-E of the main Bill, this does not require or allow the Board to impose the sanctions or take other action as provided in subsection 60-125(2) in that Subdivision. Instead, the Board will take action under the current law in relation to the entity being investigated, and may therefore, in accordance with the current law, either suspend or terminate the entity's registration or decide to take no further action following the investigation.

4.23 If the Board decides, after carrying out an investigation as mentioned in paragraph 4.21, to suspend an entity (under the current law), then the entity is taken not to be a registered tax agent within the meaning of the main Bill while it is suspended, except for the purposes of the following Parts in that Bill:

- Part 2 (Registration);
- Part 3 (The Code of Professional Conduct); and
- Part 4 (Termination of registration).

*[Schedule 2, Part 7, subitem 17(3)]*

4.24 This ensures that an entity whose registration is suspended may nevertheless apply for renewal of registration during the period of suspension, that it is bound by the Code of Professional Conduct and the obligation to notify the Board of a change in circumstances and that the grounds for termination of registration continue to apply. This is consistent with the treatment of entities whose registration is suspended under section 30-25 of the main Bill.

4.25 If the Board decides *not* to commence an investigation, it must notify the entity in writing that no further action will be taken in relation to the show cause notice. This notification in writing must be made within 30 days of the Board's decision. *[Schedule 2, Part 4, paragraph 17(1)(c)]*

4.26 The 60-day timeframe after commencement for the Board to make its decision regarding the initiation (or otherwise) of an investigation will ensure that the continuation of any inquiry or consideration of a complaint is transparent and that the subject is kept informed of the Board's intention with regard to the complaint or inquiry.

4.27 If the Board fails to make a decision within 60 days after commencement, then the Board is taken to have decided not to investigate the entity. *[Schedule 2, Part 4, subitem 17(2)]*

4.28 Complaints or inquiries that may be on foot under the current law upon commencement may relate to the following provisions:

- section 251BC or 251 KC, which relates to whether or not a person is a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers in income tax matters;
- section 251JA or 251JC, which relates to the requirements for registration and re-registration, respectively; or
- section 251K or 251KE, which relates to the reasons for which a state Board may cancel or suspend an entity's registration.

4.29 If a state Board required a person to provide evidence, information or any document and it was not provided to the state Board before the commencement time, then the evidence, information or document must be provided to the Board. *[Schedule 2, Part 4, subitem 17(4)]*

## **Legal proceedings**

### *Continuation of pending legal proceedings*

4.30 If any proceedings were pending in any court or tribunal immediately before commencement to which a state Board was a party, the Board is substituted for the state Board, after commencement, as a party to the proceedings. This ensures that, after commencement, pending proceedings may continue notwithstanding the dissolution of the state Boards. *[Schedule 2, Part 6, item 19]*

### *Legal proceedings by taxpayers to recover penalties or interest charges*

4.31 Although section 251M of the ITAA 1936 will be repealed by Schedule 1 to the exposure draft (refer to paragraph 1.15 in Chapter 1 of this explanatory material), taxpayers will retain their right to sue for and recover an amount of penalty and/or interest charge under that section as if it had not been repealed.

4.32 Therefore, if a taxpayer is or becomes liable to pay a fine or other penalty, the general interest charge under a provision of the ITAA 1936 or a shortfall interest charge because of negligent actions taken before commencement by a registered tax agent within the meaning of the current law or a person exempted under section 251L of the current law, and that registered tax agent or exempted person would have been liable to pay the amount of that fine, penalty or interest charge under section 251M of the ITAA 1936, then the taxpayer may sue for and recover that amount as if section 251M had not been repealed. *[Schedule 2, Part 6, item 20]*

### **Example 4.2**

Anna hires the services of Dan, a registered tax agent, to complete her income tax return for the 2008-09 income year. Dan submits Anna's tax return to the Australian Taxation Office (ATO) in October 2009.

The main Bill commences in early 2010.

In February, shortly after commencement, Anna receives a notice from the ATO that she has understated her income earned in 2008-09 and thus her tax payable has increased. Anna had provided all relevant information to Dan and his negligence, before commencement of the main Bill, caused her to have a tax shortfall. This tax shortfall has also exposed her to a shortfall interest charge.

Although section 251M was repealed when the main Bill commenced, Anna retains her right under section 251M to sue for and recover from Dan the shortfall interest charge that she has incurred as a result of Dan's negligence.

***Special rule relating to the civil penalty for employing or using the services of a deregistered entity***

4.33 Section 50-25 of the main Bill provides for a civil penalty for tax agents and BAS agents who employ or use the services of an entity that they know, or ought reasonably to know, was previously a registered agent and the entity's registration was terminated within one year before they first employed, or first used the services of, the entity. The civil penalty does not apply if the reason for the entity's termination was because the entity surrendered its registration, because the entity became an undischarged bankrupt or went into external administration, or because of a reason prescribed in regulations.

4.34 This exposure draft provides for a special rule relating to the cancellation of registration under the current law before commencement of the main Bill, to enable the civil penalty in section 50-25 of the main Bill to apply to those circumstances.

4.35 As such, if an entity was a registered tax agent or a registered nominee within the meaning of the current law, then the entity is taken to have been previously a registered tax agent or BAS agent for the purposes of subparagraph 50-25(1)(c)(i) of the main Bill. This provision is necessary for the civil penalty to apply because 'registered tax agent or BAS agent' is defined under the main Bill to mean an entity that is registered under the Bill as a registered tax agent or a registered BAS agent, and an entity whose registration was terminated before commencement under the current law will not meet this definition.  
*[Schedule 2, Part 6, subitem 21(1)]*

4.36 If:

- an entity was a registered tax agent or a registered nominee within the meaning of the current law (and, as outlined above, is therefore taken to have been previously a registered tax agent or BAS agent); and
- the registration of the entity was cancelled under section 251K (cancellation or suspension of registration of tax agents), other than because the entity permanently ceased to carry on a business as a registered tax agent, or under section 251KE (cancellation of registration of nominees) of the current law,

then the cancellation of the entity's registration under section 251K or 251KE is taken to have been a termination of registration under Part 4 of the main Bill (Termination of registration) for the purposes of

subparagraph 50-25(1)(c)(ii) of the main Bill. [*Schedule 2, Part 6, subitem 21(2)*]

4.37 This provision therefore deems the cancellation of registration under the current law before commencement to be a termination of registration under the main Bill for the purpose of the civil penalty for employing or using the services of an entity whose registration was terminated within one year before first engaging that entity.

### **Example 4.3**

In May 2009, Toby is convicted under section 8N of the *Taxation Administration Act 1953* for recklessly making a false statement to a taxation officer, and, as a result, a state Board decides to cancel Toby's tax agent registration.

The main Bill commences in January 2010.

Alistair, a registered tax agent, knowing the circumstances of the cancellation of Toby's registration, employs Toby in February 2010 to assist him to prepare his clients' business activity statements.

Toby is taken to have been previously a registered tax agent under the main Bill, and the cancellation of his registration is taken to have been a termination of registration under Part 4 of that Bill for the purposes of the civil penalty in section 50-25. As such, Alistair may be liable for a civil penalty under section 50-25 of the main Bill, for employing Toby when he knew that Toby's registration was cancelled within one year before he employed Toby.

4.38 The additional exclusion of cancellation of registration because a tax agent permanently ceased to carry on a business as a registered tax agent is consistent with the policy intention of the exclusions in subsection 50-25(2) of the main Bill and expressed in the explanatory memorandum to that Bill. Specifically, a civil penalty would not apply in that case because such a cancellation did not result from misconduct by the entity.

## **Review of decisions by the Administrative Appeals Tribunal**

4.39 After commencement, despite the repeal of section 251QA of the current law (which lists the decisions of the state Boards that are reviewable by the AAT) by Schedule 1 to the exposure draft, applications may still be made to the AAT under that section for review of a decision by a state Board made before commencement under a provision of the current law, if, upon commencement, the period for making an application for review had not lapsed. [*Schedule 2, Part 5, paragraph 18(1)(a)*]

4.40 The right to apply for review by the AAT allows those entities who have been affected by a decision of a state Board or the Board to question the Board's exercise of its powers before an independent administrative body. For the reviewable decisions listed in item 18 of Schedule 2 to the exposure draft, the Board is required by section 27A of the *Administrative Appeals Tribunal Act 1975* to give a notice to the affected entity/entities stating that a decision was made and that the entity has the right to have that decision reviewed. Under section 28 of that Act, the Board is required, upon request, to provide a written statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. A request for the review of a Board decision must be lodged directly with the AAT, generally by the twenty-eighth day after the day on which the terms of the decision are given to the affected person.

4.41 In addition, after commencement, applications may be made to the AAT under section 251QA of the current law for review of the following decisions made by the Board in accordance with the relevant provision in the current law:

- A decision by the Board to reject an application for registration or re-registration decided in accordance with section 251JA or section 251JC of the current law (requirements for registration and re-registration as a tax agent) — refer to paragraphs 3.47 to 3.48 in Chapter 3 of this explanatory material.
- A decision by the Board to reject an application for registration or re-registration decided in accordance with section 251KC of the current law (requirements for registration and re-registration as a nominee) — refer to paragraphs 3.47 to 3.48 in Chapter 3.
- A decision by the Board to refuse a request to allow an application for re-registration to be made at a later time in accordance with section 251JB or section 251KB of the current law (application for registration as a tax agent or nominee to be made at a later date) — refer to paragraphs 3.52, 3.54 and 3.55 in Chapter 3.
- A decision by the Board to suspend or cancel the registration of an entity after investigating the entity in accordance with the main Bill — refer to paragraphs 4.19 to 4.28.

*[Schedule 2, Part 5, paragraphs 18(1)(b) to (h)]*

4.42 Section 70-10 of the main Bill sets out the decisions of the Board under the main Bill that may be reviewed by the AAT.

4.43 To avoid doubt, this exposure draft specifies that an application may be made under section 70-10 of the main Bill for review of any of the following decisions of the Board:

- A decision under section 20-25 of the main Bill, as applied by Schedule 2 to this exposure draft (refer to paragraph 3.37 in Chapter 3), to specify a condition to which registration is subject.
- A decision under section 20-30 of the main Bill, as applied by Schedule 2 to this exposure draft (refer to paragraph 3.37 in Chapter 3), to require professional indemnity insurance to be maintained.
- A decision under subsection 60-125(4) of the main Bill, as applied by Schedule 2 to the exposure draft (refer to paragraph 4.21), to extend the period of time within which an investigation is to be completed.

*[Schedule 2, Part 5, subitem 18(2)]*

## **Transitional reporting and disclosure obligations of the Tax Practitioners Board**

### *Annual reporting requirement for the first year*

4.44 Under section 60-130 of the main Bill, the Chair of the Board will be required to prepare an annual report on the operation of the Board to be given to the Minister for presentation to the Parliament. The exposure draft provides for modified reporting requirements in the first year of the Board's operation.

4.45 If commencement occurs during the last three months of a financial year (normally April, May or June), then, despite section 60-130, the Chair is not required to prepare a report for that financial year. Instead, the operation of the Board during the period from commencement to the end of that financial year will be documented in the annual report for the next financial year. *[Schedule 2, Part 7, item 22]*

4.46 The preparation of an annual report is an important duty of the Board as it allows timely disclosure of information about the annual operation of the Board (and thereby enhances transparency and accountability). The modified reporting requirements provided in the exposure draft balance the value of timely disclosure with the competing

priorities and significant workload that the Board will have during the first months following commencement.

***Publication of information on the Internet***

4.47 Section 60-135 of the main Bill requires the Board to establish and maintain a register on the Internet of registered tax agents and BAS agents and entities that were previously a registered tax agent or BAS agent but whose registration was terminated (other than because they surrendered their registration or because of a reason prescribed in regulations).

4.48 The requirements of section 60-135 apply in relation to an entity if:

- the entity was a registered tax agent or registered nominee within the meaning of the current law; and
- in the period of 12 months before the commencement time, the entity's registration was cancelled under section 251K or 251KE of the current law (which outlines the reasons for cancellation or suspension of a tax agent's registration and the reasons for cancellation of registration of a nominee), other than because they permanently ceased to carry on a business as a tax agent (as provided in paragraphs 251K(3C)(b) and 251K(4)(c) of the current law).

*[Schedule 2, Part 7, item 23]*

4.49 Consistent with the main Bill, this provision will facilitate compliance with the civil penalty for employing or using the services of a deregistered entity — refer to the explanatory memorandum to that Bill and to paragraphs 4.33 to 4.38 in this explanatory material.

***Custody of Tax Agents' Boards' records and certain records of the Commissioner of Taxation***

4.50 The records and documents that are in the custody of a state Board immediately before commencement or that relate to the activities of a state Board but are in the custody of the Commissioner before commencement must be transferred into the custody of the Board as soon as practicable after commencement. *[Schedule 2, Part 7, item 24]*

4.51 Similarly, any records or documents that relate to the enforcement of the current law and that are in the custody of the Commissioner before commencement should be transferred into the custody of the Board as soon as practicable after commencement. This

includes records and documents that relate to unregistered entities which may be contravening the current law and/or the main Bill. *[Schedule 2, Part 7, item 24]*

## **Regulations**

4.52 The Governor-General may make regulations prescribing matters required or permitted by Schedule 2 to the exposure draft to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to Schedule 2 to the exposure draft. For example, regulations may be made in connection with the transfer of any records or documents of a state Board to the Board to ensure that the state Boards are able to transfer information and records held by them to the Board on commencement without being subject to objection from other parties. The regulations prescribed under this general regulation-making power are the proposed Tax Agent Services (Transitional Provisions) Regulations. *[Schedule 2, Part 8, subitem 25(1)]*

4.53 In particular, regulations may be made prescribing matters of a transitional nature, including saving provisions and application provisions, relating to the amendments or repeals made by Schedule 1 to the exposure draft. *[Schedule 2, Part 8, subitem 25(2)]*

4.54 The general regulation-making power described in paragraph 4.52 of this explanatory material is not limited by the particular regulations provided for and explained in paragraph 4.53. *[Schedule 2, Part 8, subitem 25(3)]*

4.55 It is appropriate for certain matters to be dealt with by regulations rather than in the exposure draft itself because they are matters of technical or procedural detail which support the provisions in the exposure draft and do not themselves impose obligations on entities or impact significantly on individuals' rights and liberties.



