



Ref 009.09

1 April 2009

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The Treasury
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By email: taxagentservices@treasury.gov.au
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Dear Paul

SUBMISSION ON THE EXPOSURE DRAFT TAX AGENT SERVICES (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009 AND EXPLANATORY MATERIAL

The Institute of Chartered Accountants in Australia (the Institute) appreciates this opportunity to review and provide comments on the exposure draft of the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 (the Bill) and Explanatory Material (EM).

The Institute is the leading professional accounting organisation in Australia, representing over 48,000 members in public practice, commerce, academia, government and the investment community. The Institute's members are advisers to businesses at all levels, from small and medium sized businesses to the largest global corporations operating in Australia and overseas.

The Institute welcomes the recent introduction of the new *Tax Agent Services Act 2009*. While we broadly support the exposure draft of the Bill and EM, we wish to take this opportunity to comment on several key aspects of the Bill prior to its finalisation to ensure that the mechanical provisions operate clearly and effectively. This will be important so that the transition to the new regime is as seamless and certain as possible for tax agents, BAS agents and taxpayers. The points raised in this submission are aimed at either clarifying areas of uncertainty, removing anomalies, or addressing perceived gaps or omissions.

Our submission points are as follows:

1. Taxpayer Safe Harbour provisions

The Bill introduces two new safe harbour provisions to protect taxpayers from the imposition of penalties in certain circumstances where they have engaged a tax agent. These two safe harbours, contained in Items 22 and 23 in Schedule 1 of the Bill, will be inserted as new subsection 284-75 (1A) and subsection 286-75(1A) in Schedule 1 of the *Taxation Administration Act 1953 (TAA)*.

- *'All relevant taxation information'*

We note that one of the prerequisites for the safe harbour provisions to apply for the benefit of a taxpayer is that the taxpayer must have given the registered tax agent or BAS agent "all relevant taxation information".

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Paragraph 2.19 of the EM provides some guidance on what constitutes “all relevant taxation information”, stating that the taxpayer must provide “accurate and complete information in response to questions asked by their agent”, and the taxpayer must “bring to the agent’s attention all information which they would reasonably expect to be necessary” to enable the agent to provide their service correctly. Paragraph 2.22 of the EM confirms that “relevant information” also includes a signed document.

The Institute considers that the use of the wording “all relevant taxation information” poses a potential problem with achieving the objective of consumer protection, in that if a client uses a tax agent who does not ask the right questions, the taxpayer will not provide the “relevant information”. Consequently, sections 284-75(1A) and 286-75(1A) will not apply to protect the client from penalty and the agent may also be disciplined by the Board. The client in that situation would, however, be likely to be able to recover the penalties in an action against the tax agent.

Given that the safe harbour protection does not apply in such a case, the Institute would recommend that Treasury consider amending the wording so that the consumer protection aim is achieved by the safe harbour, without the need for clients to take action against tax agents to recoup penalty costs.

- *Late lodgement - provision of information in sufficient time*

Subsection 286-75(1A) provides that a taxpayer is not liable for an administrative penalty for late lodgement if all relevant taxation information is given to an agent to enable the agent to give a return, notice, statement or other document to the Commissioner by a particular day, and the agent does not lodge the relevant return etc. by that date.

Paragraph 2.22 of the EM states that “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”. That is, the taxpayer must provide the required information within the timetable specified by the agent.

As previously submitted, to provide certainty for tax agents on the operation of this provision, we would request that such clarification be inserted into the Bill rather than solely in the EM. Specifically, we submit that section 286-75(1A) should be amended by inserting, after the words “all relevant taxation information”, the further words “in sufficient time”.

2. Transitional protection for ongoing BAS service providers

- *Reference to an “individual”*

Item 5 of Part 2 in Schedule 2 of the Bill provides transitional protection, by way of interim registration, for certain BAS service providers to allow the ongoing provision of BAS services in circumstances where the provider was previously exempt from having to register. However, Item 5 seems to only provide the transitional concession for a BAS service provider who is an individual and omits to include other entities, such as companies.

As many BAS service providers are partnerships and companies, we would request that the reference to an “individual” be amended to refer to a “person” which would then include partnerships and companies. This would also be consistent with the wording of the mirror Items 3 and 4 of Part 2 in Schedule 2, which use the term “person” to describe the entity to whom the protection applies.

3. Transitional registration issues - unregistered entities and nominees

- *Rights, obligations and other implications of entities “taken to be registered”*

As mentioned in point 2 above, the Bill provides for a form of a ‘deemed’ interim registration for both tax agents and BAS agents in circumstances where they have not been required to register under the existing tax agent regime, but are currently providing tax agent or BAS agent services on the commencement of the new regime. Specifically, under Items 4 and 5, Part 2 in Schedule 2, a tax agent or a BAS agent will be *taken to be* a registered tax agent or a registered BAS agent respectively for a period of 2 years, if within 6 months they notify the Board that they qualify for the interim registration.

Item 3 of Part 2 in Schedule 2 provides that a registered nominee is *taken to be* a registered tax agent under the new law until such time as the nominee registration would have expired or is cancelled. Furthermore, Item 9, Part 3 in Schedule 2 of the Bill provides that where a registered nominee has applied for re-registration under the existing regime, and that application has not been determined before commencement of the new regime, the nominee is *taken to be* a registered tax agent for a period of 6 months or until the Board determines the application in accordance with the existing regime (i.e. under section 251KC of the *Income Tax Assessment Act 1936*).

The Institute has identified a number of uncertainties as to the rights, obligations and other implications associated with such ‘deemed’ interim registrations. These uncertainties include:

- whether such registrations carry the full rights and obligations associated with an ordinary tax agent or BAS agent registration, such as the ability to lodge returns, and accountability under the code of professional conduct; and
- whether entities attributed with such registrations will be counted in determining whether an entity has a “sufficient number” of registered tax agents, as required for registration of a tax agent entity, such as a partnership.

We would appreciate if the EM could provide clarification on the rights, obligations and implications associated with entities being “taken to be registered” for a transitional period, in particular in respect of the above areas of uncertainty.

4. Expiry of transitioned registrations – tax agents, nominees and unregistered entities

Items 2 and 3 of Part 2 in Schedule 2 of the Bill provide that existing registrations as a tax agent or as a nominee will be treated as registrations under the new law. However, that deemed registration ends under the transitional provisions (if not cancelled or terminated beforehand) when the registration under the old law would otherwise have expired.

Similarly, under items 4 and 5 of Part 2 in Schedule 2, deemed registration arises for those persons that are not required to be registered under the old law, but are required to be registered under the new law. Such deemed registration continues for a period of 2 years until it expires.

The Institute considers that it is not clear how this expiry under the transitional provisions is dealt with under section 20-50 of the *Tax Agent Services Act 2009*, which relates to renewals. In particular, we note that under section 20-50, a registration continues (despite prescribed expiry under section 20-35) until the Board considers the application for renewal. In our view, the transitional law should provide that the expiry is subject to section 20-50 of the new law. Those persons transitioned into a registration under the new law should simply be treated as renewal cases under the new law when the transitional period ends and the law should expressly say this. We recommend that the Bill be amended accordingly, as we do not believe that the law will achieve this as currently drafted.

5. Transitional disciplinary inquiries by new Board

- *Investigations conducted in accordance with new procedures, but old standards*

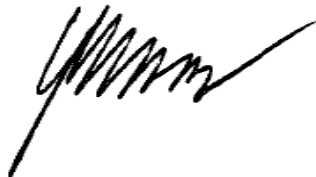
Item 17 of Part 4 in Schedule 2 provides for the continuation of inquiries already on foot by a Tax Agents' Board. Sub-paragraph 17(1)(ii) specifies that the investigation is to be carried out in accordance with the process required or allowed under the new law (Subdivision 60-E) "as if the Board were investigating conduct that may breach the *Tax Agent Services Act 2009*".

The Institute seeks clarification that the conduct which is being investigated will be examined by reference to the standards in the old law, not the new law. This is not clear from the current drafting of the provision in the Bill, however we would expect that this is an integral part of following the principles of natural justice. By contrast, in other provisions in the Bill, for example in Item 9, Part 3 in Schedule 2 of the Bill (mentioned above), it is clear that the Board must determine the application "in accordance with... the old law".

We recommend that Item 17 be amended accordingly to clarify that, while the investigation is to be conducted in accordance with the new procedures, the assessment of past conduct will be made in accordance with standards applicable under the old law.

The Institute would be pleased to discuss the points raised in this submission should the Treasury require any further detail. If you have any queries, in the first instance, please contact Donna Bagnall on (02) 9290 5761 or Yasser El-Ansary on (02) 9290 5623.

Yours sincerely



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The Institute of Chartered Accountants in Australia