

EXPOSURE DRAFT EXPLANATORY STATEMENT

STATUTORY RULES 2009 No.

Issued by authority of the Assistant Treasurer

Tax Agent Services Act 2009

Tax Agent Services Regulations 2009

Section 70-55 of the *Tax Agent Services Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Regulations relate to the Act which implements the new legislative regime for tax agent services as announced by the former Assistant Treasurer and Minister for Competition Policy and Consumer Affairs on 29 May 2008.

The objective of the Regulations is to provide details to accompany the Act. They prescribe the:

- requirements for registration as a tax agent and a Business Activity Statement (BAS) agent;
- definitions of, and requirements for recognition as, recognised professional associations (RPAs) and recognised BAS agent associations;
- fees for registration applications;
- allowances and expenses payable to persons required to appear before the Tax Practitioners Board (Board) to give evidence or to provide certain documents; and
- obligations of the Commissioner of Taxation to provide administrative support to the Board.

Further details of the Regulations are set out in the Attachment.

The details of the Act and the Regulations were developed through an extensive consultation process commencing in 1998, involving both targeted confidential consultation and public consultation. Confidential consultation took place on the proposed legislative framework with the chief executive officers of the RPAs, the Chairs of the state Tax Agents' Boards, a working group of the National Tax Liaison Group and a sample of tax agents and bookkeepers/BAS service providers during 2005. Several rounds of confidential consultation on drafts of the Bill and Regulations followed during 2006 and early 2007. Public consultation on a draft Bill and draft Regulations took place over a 14-week period in mid-2007, followed by a four-week period in 2008 and the draft Regulations were again consulted on for a [four]-week period in mid 2009.

The Act specifies no condition that needs to be satisfied before the power to make the proposed Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations relating to the name, commencement and definitions used in the Regulations (Regulations 1 to 3) and those relating to the Board (Regulation 11) commence on the day after registration on the Federal Register of Legislative Instruments. This recognises that the provisions in the Act relating to the Board have already commenced (allowing the Board to be set up in preparation of the new regulatory regime).

The remainder of the Regulations will commence at the same time as the main provisions of the new regime.

ATTACHMENT

Details of the Tax Agent Services Regulations 2009

Regulation 1 — Name of Regulations

This regulation provides that the title of the Regulations is the *Tax Agent Services Regulations 2009*.

Regulation 2 — Commencement

This regulation provides that the Regulations 1 to 3 and 11 commence on the day after they are registered and all other Regulations commence on the commencement of Part 2 of the *Tax Agent Services Act 2009*.

Part 2 of the *Tax Agent Services Act 2009* commences on a single day to be set by Proclamation.

Regulation 3 — Definitions

This regulation provides definitions for the terms used within these Regulations. The term *Act* refers to the *Tax Agent Services Act 2009*. *Board* refers to the Tax Practitioners Board established by section 60-5 of the Act. *Recognised BAS agent association* has the meaning given by Regulation 4. *Recognised professional association (RPA)* has the meaning given by Regulation 5. (Note that Regulations 4 and 5 are outlined below.) *Secretary* means the secretary of the Board and includes a person performing the secretary's duties in his or her absence.

Regulations 4 and 5 and Schedule 1 — Recognised Associations

Recognition

Regulations 4 and 5 allow organisations to be recognised as a recognised professional association (RPA) or a recognised BAS agent association. Recognition as an RPA or a BAS agent association provides an avenue of registration as a tax agent or BAS agent for members of those organisations. The decision to recognise an organisation as an RPA or a BAS agent association rests with the Tax Practitioners Board (the Board).

In determining whether to recognise an organisation as a BAS agent association, Regulation 4 states that the Board must have regard to a set of objective requirements outlined in Part 2 of Schedule 1 of the Regulations. Regulation 5 similarly states that the Board must have regard to the objective requirements listed in Part 1 of Schedule 1 of the Regulations in determining whether or not to recognise an organisation as an RPA.

The requirements outlined in Schedule 1 of the Regulations (further described below) ensure that only those professional associations that enforce high educational, ethical and professional requirements (relevant to taxation) on their members can be recognised by the Board as RPAs or recognised BAS agent associations. The education requirements for RPAs and recognised BAS agent associations are

different, reflecting the different level or qualifications requirement for registration as a tax agent or BAS agent .

The recognition process requires the organisation to apply to the Board in a form approved by the Board. As soon as practicable after receiving an application, the Board must consider the application and decide whether to recognise the organisation. If all the requirements relevant to their application in Schedule 1 are satisfied, the Board must decide to recognise the organisation as an RPA or recognised BAS agent association (as appropriate), notify the organisation in writing of the decision and publish a notice of the decision on the Board's website. The Board must refuse to recognise an organisation if one or more of the requirements relevant to their application in Schedule 1 are not met. There are, however, two exceptions to this:

- Where the only requirement that the organisation fails to satisfy is the number of voting members, the Board has the discretion to recognise the organisation as an RPA or recognised BAS agent associations. However, in doing so the Board must be satisfied that the membership of that organisation is wholly or substantially located within a particular geographical area in Australia and that the membership is reasonably proportionate to the population of that area. This exception recognises that there might be some State or Territory-based associations which struggle to reach the requisite membership threshold because of the size of the State or Territory (for instance, in Tasmania, ACT or the Northern Territory).
- In relation to recognition as a BAS agent associations, for the period of three years starting when Regulation 4 commences, the Board must decide to recognise an organisation if item 209 of Part 2 of Schedule 1 is the only requirement that does not exist in relation to the organisation. Item 209 of Part 2 of Schedule 1 provides that voting members of the organisation must have obtained a Certificate IV Financial Services (Bookkeeping) or Certificate IV Financial Services (Accounting) from a registered training organisation or equivalent institution.
 - This transition period recognises that BAS agents themselves are exempt under the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009* from the qualification requirements following the commencement of the new regime. Recognising an organisation as a BAS agent association before its members are required to satisfy the necessary qualification requirement for registration, will allow that organisation to assist their members to obtain the required qualifications

If the Board refuses to recognise the organisation, the Board must notify the organisation in writing of the decision to refuse recognition detailing the reasons for the decision.

Termination

The Board must terminate recognition of an RPA or recognised BAS agent association if the Board is satisfied that one or more of the prescribed requirements ceases to exist. In satisfying itself, the Board must advise the recognised association of its intention to terminate recognition and give the association the opportunity to

object. To this end, the Board may only terminate recognition after it has notified the association of its belief (with reasons) that the association has ceased to satisfy a requirement and provided the association with the opportunity to make a written submission within reasonable time. The Board must then consider if a criterion has ceased to exist, having regard to any submission made by the association. Once the Board terminates the recognition of the organisation it must also notify the organisation in writing of the decision and the reasons for that decision and publish a statement regarding the termination on the Board's website. The Board's decision to refuse or terminate recognition is reviewable by the Administrative Appeals Tribunal.

A recognised BAS agent association that is recognised by the Board within 3 years of commencement of the new regime even though it does not require its voting members to have certain qualifications (that is, it is recognised under item 209 of Part 2 of Schedule 1 – see above) will be liable to have its recognition terminated if, after 3 years, it does not introduce the education requirement for its members.

Prescribed requirements for recognition as a recognised association

Schedule 1 of the Regulations sets out the requirements for recognition as an RPA and recognised BAS agent association.

Recognised professional association

As noted above, the requirements for recognition as an RPA are set out in Part 1 of Schedule 1. To qualify for recognition as an RPA, an organisation must satisfy the Board that it is a non-profit organisation with at least 1,000 voting members, it must have adequate corporate governance and operational procedures to ensure that it is properly managed and internal rules are enforced, it must be able to pay its debts as they fall due, and the management of the organisation must be accountable to its members and abide by the corporate governance and operational procedures of its organisation.

The organisation must have professional and ethical standards for its members including requirements that voting members must undertake an appropriate number of hours of continuing professional education each year and must be of good fame, integrity and character. The appropriate number of hours of continued professional education will differ depending on the profession to which the voting members belong.

Voting members must be subject to rules controlling their conduct in the practice of that profession and must be subject to discipline for breaches of those rules. If the voting member is permitted by that organisation to be in public practice, the voting member must be required to have professional indemnity insurance.

The organisation must have satisfactory arrangements in place for notifying clients of its members (or of members of its member bodies) as to how to make complaints and for receiving, hearing and deciding those complaints and taking disciplinary action if complaints are justified. The organisation must have satisfactory arrangements in place for publishing annual statistics about the kinds and frequency of complaints (except complaints under the Act about registered tax agents), findings made as a result of complaints and action taken as a result of those findings.

In certain cases, an organisation is taken to have arrangements that comply with the requirements related to professional and ethical standards for members, dealing with complaints and publishing annual statistics, where arrangements for such requirements are governed by external regulation. An organisation is taken to have such arrangements in place if it is subject to a law of a State or Territory, or rule or other instrument of a body created by or under a law of a State or Territory, that sets out requirements that have a similar effect to those requirements mentioned above. This allows legal professional associations to be recognised as RPAs, because, in the legal profession, these requirements are regulated by State and Territory law or by a statutory body.

To qualify for recognition by the Board as an RPA, item 109 of Part 1 of Schedule 1 of the Regulations provides that the organisation's voting members must comply with at least one of the following requirements:

- the member has been awarded a degree or a post graduate award from an Australian tertiary institution or equivalent institution, in the discipline of accountancy; or
- the member has been awarded a diploma or higher award from a registered training organisation or equivalent institution in the discipline of accountancy; or
- the member has been admitted as an Australian legal practitioner; or
- the member was registered as a tax agent or a nominee for the purposes of Part VIIA of the *Income Tax Assessment Act 1936* and was a voting member of a recognised professional association (within the meaning of section 251LA of the *Income Tax Assessment Act 1936*) immediately before the commencement of item 109 of Part 1 of Schedule 1 of the Regulations. This allows individuals that are voting members of an RPA registered under the old law to continue to be voting members of organisations that seek accreditation under the new regime (notwithstanding that they may not otherwise have the necessary qualifications).

Recognised BAS agent association

The requirements for recognition as a recognised BAS agent association are set out in Part 2 of Schedule 1 of the Regulations. Recognised BAS agent associations will have to satisfy the Board that they have complied with largely the same objective requirements that apply to RPAs. The only differences relate to the number of voting members and the educational requirements. Recognised BAS agent associations must either have at least 1,000 voting members or at least 500 voting members who are registered BAS agents under the Act. An organisation must (subject to the exception outlined above) satisfy the Board that its voting members have been awarded at least a Certificate IV Financial Services (Accounting) or a Certificate IV Financial Services (Bookkeeping) from a registered training organisation or an equivalent institution.

Regulation 6 — Exclusion from the meaning of tax agent service

Tax agent service is defined in section 90-5 of the Act. Subsection 90-5(2) allows services to be excluded from this definition through regulations. Regulation 6 specifies that, for subsection 90-5(2) of the Act, a service provided by an auditor of a self managed superannuation fund (SMSF auditors) under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) is not a tax agent service.

Services provided by SMSF auditors are excluded from the definition of *tax agent service* because:

- the qualifications and experience requirements for SMSF auditors are different from those for tax agents;
- the functions SMSF auditors perform are different from those of a tax agent; and
- SMSF auditors are already subject to penalties under the SIS Act and are subject to disciplinary procedures from their professional associations.

It would be inappropriate to regulate services provided by SMSF auditors under the SIS Act as those services are already regulated under a separate regulatory framework. This exemption does not exempt all services provided SMSF auditors from the definition of tax agent service.

Regulations 7 and 8 and Schedule 2 — Tax agents and BAS agents

Paragraph 20-5(1)(b) of the Act provides that individual applicants must meet the requirements prescribed by the Regulations (including, but not limited to, requirements relating to qualifications and experience) in respect of registration as a tax agent or BAS agent under the Act. Regulations 7 and 8 provide that the eligibility requirements for registration as a tax agent and as a BAS agent are prescribed, respectively, in Part 1 of Schedule 2 and Part 2 of Schedule 2 of the Regulations. (Schedule 2 is explained below.)

Regulations 7 and 8 state that an individual is only required to comply with one of the combinations of requirements. The prescribed requirements vary depending on the applicant, but in each case require the applicant to satisfy two essential requirements relating to:

1. academic qualifications; and
2. relevant experience.

Tax agents

To satisfy the prescribed requirements for registration purposes, Division 1 in Part 1 of Schedule 2 of the Regulations provides that an individual tax agent must satisfy one of a number of academic and relevant experience combinations.

Tertiary qualifications

An applicant with a prescribed tertiary qualification must have the equivalent of 12 months of full-time relevant experience in the last five years. The prescribed tertiary qualifications are:

- degree or post-graduate award from an Australian tertiary institution, or a degree or award that is approved by the Board from an equivalent institution, in the discipline of accountancy, *and* a course in each of Australian taxation law and commercial law that are approved by the Board; or
- a degree or a post-graduate award from an Australian tertiary institution, or a degree or a award that is approved by the Board from an equivalent institution, in another discipline that is relevant to the tax agent services to which the application relates, *and* a course in each of basic accountancy principles, Australian taxation law and commercial law that are approved by the Board; or
- completion the academic and other requirements for admission as an Australian legal practitioner *and* courses in each of Australian taxation law and basic accountancy principles that are approved by the Board;

Diploma

An applicant can also have a diploma or higher award from an Australian registered training organisation or an equivalent institution in the discipline of accountancy. Again this must also include/be supplemented by a course in each of Australian taxation law and commercial law that are approved by the Board.

Applicants seeking registration via this avenue must also have been engaged in the equivalent of 2 years of full-time relevant experience in the preceding 5 years.

Without formal qualifications

Applicants without any formal qualifications but with significant relevant experience can also be registered. To be successful, such applicants must have been engaged in the equivalent of eight years of full-time relevant experience in the preceding 10 years. Again, such applicants must also have completed a course in each of basic accounting principles, Australian taxation law and commercial law that are approved by the Board.

Membership of a professional association

In recognition of the fact that voting members of an RPA are subject to an additional 'layer' of professional oversight and support, such membership also provides an avenue to registration. Such applicants, however, are also required to have been

engaged in the equivalent of eight years of full-time relevant experience in the preceding 10 years.

Meaning of relevant experience for tax agents

The definition of relevant experience for tax agents under Division 2 in Part 1 of Schedule 2 means:

- work by an individual as a tax agent under the Act or under Part VIIA of the *Income Tax Assessment Act 1936* (that is, work as a tax agent prior to the commencement of the new regime); or
- work by an individual under the supervision and control of a tax agent under the Act or under Part VIIA of the *Income Tax Assessment Act 1936*; or
- work by an individual as an Australian legal practitioner; or
- work by an individual of a kind that is approved by the Board.

The individual's work experience must have included substantial involvement in one or more of the types of tax agent services described in section 90-5 of the Act, or substantial involvement in a particular area of taxation law to which one or more of those types of tax agent services relate.

Under subsection 50-5(3) of the Act, a legal practitioner can provide certain tax agent services for a fee without registration as a tax agent in certain circumstances. Consequently, a legal practitioner must register as a tax agent if they wish to prepare or lodge a return or provide any other tax agent service that does not fall within the course of his or her profession. It is for this reason that the definition of relevant experience includes work as an Australian legal practitioner provided this work includes substantial involvement in the provision of tax agent services.

Further, specialist tax practitioners will be able to register as a tax agent under the Act, as the definition of relevant experience permits those individuals who only provide tax advice or who specialise in an area of taxation law to be registered as tax agents.

BAS agents

Division 1 in Part 2 of Schedule 2 of the Regulations sets out the requirements for registration as a BAS agent. Again, an applicant must satisfy an academic and relevant experience combination.

Accounting qualifications

Under this avenue, an applicant must have completed a Certificate IV Financial Services (Accounting) or Certificate IV Financial Services (Bookkeeping), or higher award, from a registered training organisation or equivalent institution that includes the successful completion of a course in basic goods and services tax/BAS taxation principles.

In addition, the applicant must have undertaken at least 1,400 hours of relevant experience in the preceding three years.

Membership of a professional association

Again, voting membership of either an RPA or a recognised BAS agent association provides an avenue to registration. If an applicant is a voting member of the former, they are also required to have undertaken at least 1,000 hours of relevant experience in the preceding three years. If the applicant is a voting member of the latter, they must also have undertaken at least 1,400 hours of relevant experience in the preceding three years.

This difference in hours of experience results from the fact that the qualification requirements for membership of an RPA is higher than that of a recognised BAS agent association.

Meaning of relevant experience for BAS agents

The definition of relevant experience for BAS agents under Division 2 in Part 2 of Schedule 2 means:

- work by an individual as a registered tax agent under the Act or under Part VIIA of the *Income Tax Assessment Act 1936*; or
- work by an individual as a registered BAS agent; or
- work by an individual under the supervision and control of a registered tax agent under the Act or under Part VIIA of the *Income Tax Assessment Act 1936*; or
- work by an individual under the supervision and control of a registered BAS agent; or
- work by an individual of a kind approved by the Board.

In each case, for experience to be recognised as ‘relevant’ the individual’s work must have included substantial involvement in one or more of the kinds of BAS services described in section 90-10 of the Act, that is, advice or compliance work, or representing an entity in dealings with the Commissioner of Taxation (Commissioner).

The Board is able to approve experience gained other than as a registered agent or under the supervision and control of a registered agent as ‘relevant’. Currently individuals providing BAS services are not required to be registered tax agents or working under supervision and control (eg, BAS services may be provided by RPA members and by bookkeepers working under the direction of a tax agent (which is much broader than supervision and control)).

Regulation 9 — Application for Registration

An application for registration under section 20-20 of the Act must be accompanied by an application fee. The fee for an application to the Board for registration

(including renewal of registration) is set out in the table in Regulation 9. The registration application fees for a tax agent who carries on a business as a tax agent and a tax agent who does not carry on a business as a tax agent are \$500 and \$250 respectively. The registration application fees for a BAS agent who carries on a business as a BAS agent and a BAS agent who does not carry on a business as a BAS agent are \$100 and \$50 respectively.

While the distinction between tax agents and nominees existing under the old regime (and therefore, the relevance of whether the entity is ‘carrying on a business’) has been removed from the registration requirements in the new regime, this distinction is maintained in the fee structure. This recognises that those entities ‘carrying on a business’ have a greater capacity to pay.

Regulation 10 — Allowances and expenses for witnesses required to appear before the Board

The investigation and enforcement powers of the Board contained in section 60-105 of the Act enable the Board to require a person to appear before it to give evidence or to produce certain documents.

Regulation 10 sets out the prescribed allowances and expenses payable to a witness who is required to attend an investigation to give evidence. These prescribed allowances and expenses seek to reimburse or compensate witnesses for the time, skill, costs (and foregone earnings) that they incur or bring to the conduct of an investigation. Item 1 of the table in Regulation 10 stipulates that a person required to give evidence because of that person’s professional, scientific or other special skill or knowledge is entitled to receive a prescribed allowance in respect of each day on which that person attends, being the amount specified in the *High Court Rules 2004* in relation to the expenses of a witness of that kind.

Similarly, item 2 of the table states that persons not mentioned in item 1 also receive an amount specified by the *High Court Rules 2004* in relation to the expenses of a witness of that kind. Under item 3 a witness should be paid an additional amount for giving skilled evidence, being an amount that the Board considers reasonable and properly incurred and paid for qualifying to give skilled evidence. Under item 4, in addition to the amount payable to the person under item 1 or 2, and any amount payable under item 3, the person may also be paid an amount that the Board considers reasonable for the actual cost of the person’s conveyance and an amount the Board considers reasonable for sustenance or maintenance.

Regulation 11 — Administrative support and role of Secretary

Regulation 11 provides that the Commissioner must make available to the Board persons engaged under the *Public Service Act 1999* and performing duties in the Australian Taxation Office (ATO) to provide administrative assistance to the Board. The Commissioner must appoint one of those persons to be the secretary of the Board.

In determining the number of persons to be made available to the Board, the Commissioner must have regard to:

- the number of persons required to enable the Board to perform its functions; and
- the amount of funding that has been allocated for the purpose of the Board performing its functions.

The Regulation is designed to ensure that the Board is provided with adequate and sufficiently skilled administrative assistance to enable it to effectively perform its functions. However, the amount of resources provided would be limited by the funding allocated for the purpose of the Board performing its functions and would be made in line with the Commissioner's broader obligations under the *Financial Management and Accountability Act 1997* (FMA Act).

With respect to the person to be appointed as secretary and with respect to the allocated funding, it would be expected that the Commissioner would consult with the Board.

The secretary must manage the resources made available for the purpose of administrative assistance to the Board in accordance with the *Public Service Act 1999*, the *Financial Management and Accountability Act 1997* and other applicable legislative instruments, attend all meetings of the Board and keep a record of the proceedings of the Board. If the secretary signs a certificate or other instrument (issued by the Board) on the Board's behalf, the certificate/instrument is considered to be sufficiently authenticated. As it may be impractical for the secretary to be in attendance at all meeting, he or she has the power to delegate any of his or her functions to another officer of the ATO whose services have been made available to the Board by the Commissioner. This is in addition to the secretary's representative (in his her or her absence) being able to assume the role of secretary.

Regulation 12 — Register of registered and deregistered agents

Section 60-135 of the Act provides that the Board must establish and maintain a register of registered agents and each entity who was a registered agent and whose registration has been terminated, except in certain circumstances.

The following information must be included on the registered of registered agents:

- The name of the agent.
- The contact details of the agent.
- Any relevant professional affiliation.
- Duration of registration.
- Conditions on the registration.
- Any sanctions that have been imposed by the Board on the agent (other than a caution).

The following information must be included on the register of deregistered agents:

- The name of the entity.
- Contact details of the entity.
- Date of effect of the termination.
- The reason for termination.

The publication of information about registered agents whose registrations have been terminated will facilitate compliance with the civil penalty for employing or using the services of a deregistered entity in the Act.

Similar to the requirement that information regarding termination should only be placed on the register for a period of 12 months following the date of termination, information regarding other sanctions (other than cautions) will also be placed on the register for a period of 12 months commencing on the day on which the sanction is imposed or the period during which the sanction has effect (whichever is the longer). This limitation seeks to strike a balance between the public's interests in being made aware of inappropriate conduct of their representatives and the tax agent or BAS agent's interests in moving on from previous infractions.

The registers may include other information that is relevant to the operation of the arrangements for the registration of tax agents and BAS agents.