Michael B. Evans (ABN 71846945114)
PO Box 467
Glenelg SA 5045
Australia
Tel: +61 412252228

The Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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Dear Sir

Inquiry into the *Tax Laws Amendment (2013 Measures No. 2) Bill 2013*

Thank you for the opportunity to make a submission to the Senate Standing Committee in relation to the *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* (the Bill).

I wish to make comments on both Schedules 3 and 4 of the Bill in respect of proposed amendments to the *Tax Agent Services Act 1999* (TASA)

Schedule 4

There are two aspects of the proposed amendments that, in my view, should not proceed. Both matters concern the conferring legislative power on the Tax Practitioners Board (the Board):

1 Removal of merit based review of the requirement to maintain professional indemnity insurance (PI insurance)

Clause 22 of Schedule 4 proposes **to repeal** paragraph 70-10(b) of TASA.

Under the existing law:

- Paragraph 70-10(b) grants a registered tax agent the right to apply to the Administrative Appeals Tribunal for review of a decision of the Board to require PI insurance.
- Subsection 20-30(3) empowers the Board, upon granting an application for registration as a tax agent, by written notice, to require the tax agent to maintain PI insurance.
- Subsection 30-20(13) includes, as one of the items of the Code of Professional Conduct that a registered tax agent "must maintain the professional indemnity insurance that the Board requires."

Under the proposed law:

- The right of an AAT review of the decision to require PI insurance is repealed; and
- Subsection 30-10(13) is replaced with the following:

Liability is limited by a scheme approved under Professional Standards Legislation.

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(13) You must maintain professional indemnity insurance that meets the Board's requirements.

- Section 20-5 of TASA will be amended to make compliance with the Board's requirement for PI insurance a precondition to eligibility for registration as a tax agent or BAS Agent or tax (financial) adviser.[1]

  The Bill proposes related amendments in clauses in Clauses 1,2 and 3 of Schedule 4 to provide that an individual, partnership or company is eligible for registration as a registered tax agent, BAS agent or tax (financial) adviser if **the Board is satisfied that**:

  - the applicant maintains, or will be able to maintain, professional indemnity insurance that meets the Board's requirements; and
  - in the case of an individual that applies for renewal of registration the individual has completed continuing professional education (CPE) that meets the Board's requirements.

Submission in relation to proposed repeal of paragraph 70-10(b)

Why the Pi insurance decision should remain as originally legislated

Under the existing law, the Board's decision to require a registered agent to maintain professional indemnity insurance must be a decision based on the facts of the particular agent and can be reviewed on its merits by the AAT.

The proposal to remove the right of review of the Board's decision to require PI insurance and the related proposals concerning the code of professional conduct and pre-condition of registration should **not** proceed.

Items 1,2, 3, 4 and 22 of Schedule 4 should be deleted.

In conversations with some parties associated with the amendments it has been suggested that the proposed regime will allow a merit based review of the PI insurance arrangements to be available in the event that the Board refuses.

In my view, this is **not** the case! The review is limited to whether the decision maker should be satisfied that PI insurance will be maintained. The Board's requirement for PI insurance itself will not be subject to review.

In this regard the proposed changes to the arrangements elevate the Board's decision to require PI insurance to legislative power. The propose scheme is, therefore, the delegation of legislative power to the Board.

The decision of the Board to require that a registered agent must maintain professional indemnity insurance and the form and extent of that requirement should be a decision that is able to be reviewed by the AAT.

[1] The inclusion of a "tax (financial) adviser" is proposed by separate amendments in Schedule 3.

In its booklet entitled “what decisions should be subject to merit review?”, the Administrative review Council state that

> 1.3. The principal objective of merits review is to ensure that those administrative decisions in relation to which review is provided are correct and preferable:
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> - correct - in the sense that they are made according to law; and
> - preferable - in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.
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> 1.4. This objective is directed to ensuring fair treatment of all persons affected by a decision.
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> 1.5. Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced. …
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> 2.1. As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding the merits review of a decision that otherwise meets the Council's test.
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> 2.2. The Council's approach reflects the requirements for standing to appear before the AAT. Section 27 of the Administrative Appeals Tribunal Act 1975 ('AAT Act') provides that persons whose interests are affected by a decision may apply to the AAT for review of the decision.
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> 2.3. The AAT has taken the view that, while section 27 does not use an adjective to describe the relationship between the decision and the applicants' interest, the section does require an applicant to demonstrate that an interest of theirs was genuinely affected.
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> 2.4. The Council prefers a broad approach to the identification of merits reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits.
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> 2.5. If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.

Objects, Scope and Purpose of TASA

The decision of the Board to require PI insurance ought not to be one that is made, as a matter of principle, for all registered agents regardless of the scope of their activities or the degree of the risks of loss by the community that relies on its services.

Significantly, the **focus of the tax agents legislation is limited** to services that are provided by agents in circumstances where the client can reasonably be expected to rely on the service to satisfy liabilities or obligations or to claim entitlements that arise, or could arise, under a taxation law.

In other words, it is the reliance of clients for the purposes of lodgment of tax returns or BASs (as the main examples) that is the focus of the regulatory requirements. The imposition of a requirement for PI insurance should, it is submitted, require an examination of the extent of the agent's activities in this regard to determine whether it is necessary to impose on the agent the financial and compliance costs to continue to provide valuable services to the community.

The object of the TASA legislation is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct.[2] The stated methods of doing so is through the Code of Professional Conduct and the ability to impose sanctions on recalcitrant agents. A condition for PI insurance is one of the conditions that can be imposed on an agent. It, like all other conditions, is currently eligible for an AAT review.

Importantly, the liklihood of the loss arising from an incorrect return (or BAS) that is the focus of the PI insurance requirement, not negligent advice of a broader nature.

The PI insurance decision of the Board has the potential to adversely affect the ability of part-time or retiring practitioners from providing competent services to the community at costs that the community can afford.

Example

For example, I am aware of one case where a retired person who had been a registered tax agent of more than 40 years, wished to provide tax lodgement services to the residents of his retirement village who did not have access to their own agent. One can imagine that this service would be put in peril if the retired person was required to pay for both registration and PI insurance.

The framework of the Administrative Review Council's booklet on merit based review supports the view that the requirement for PI insurance for registered agents should remain as was originally enacted by Parliament – that is, a decision made on the facts of each particular case and eligible for merits based review.

Submission on requirement for CPE

The proposed inclusion of a CPE requirement for registration is, like PI insurance, the delegation of legislative power to the Board.

Under the existing law, for CPE, subsection 30-10(8) includes an item in the Code of professional Conduct that:

> (8) You must maintain knowledge and skills relevant to the *tax agent services that you provide.

[2] Section 2-5 of TASA.

Under the existing law, the manner in which this might be done is **not** within the power of the Board to prescribe.

It is, in my view, inappropriate to allow the Board to make its own prescriptive rules about how a registered agent is to maintain their knowledge.

The proposed approach allows the Board to write its own legislation - not subject to review or exception. Regulation of this nature is not supported, in my view, by any evidence of "market failure".

Lord Hewart described delegated legislation as "the New Despotism".

> Whether good or bad, delegated legislation is inevitable (The Committee on Minister's Powers (1932)). One member said that it was "a necessary evil, inevitable, … But nevertheless a tendency to be watched with misgiving."

In the case before the Committee, the delegated legislative power is not in the hands of a Minister of the Crown who is accountable to Parliament and the community but, rather, to the Board and not subject to any review or objection.

Clause 1 of Schedule 4 should not proceed.

2 Power to extend the scope of BAS services and tax (financial) advice service

Clause 27of Schedule 4 proposes to include subsection 90-10(1A) as follows:

> (1A) The Board may, by legislative instrument, specify that another 6 service is a ***BAS service***.

The existing law defines BAS service in subsection 90-10(1) and subsection 90-10(2) provides that:

> (2) A service specified in the regulations for the purposes of this subsection is not a ***BAS service***.

Submission in relation to proposed grant of legislative power to the Board concerning BAS services

For the reasons alluded to above concerning delegated legislative power, clause 27 should be deleted from the Bill.

It is inappropriate to grant the Board unfettered power to change one of the fundamental structural limitations contained in TASA upon which many other design aspects of the TASA are based. For example, the registration of a BAS agent involves the attaining of academic qualifications and experience set out in the regulations. These are set at a significantly lower level than persons seeking broader tax agent registration because the scope of BAS Agents services is far more restricted.

Changes to education requirements, for example, are not able to be changed by the Board. It is inappropriate to allow the Board to expand the scope of BAS agent services while leaving the prerequisites to registration a regulatory power.

The existing structure of the TASA and its regulations limits, by legislation and regulation:

- the scope of services that BAS Agents and Tax agents might provide; and
- the prerequisite qualifications and experience that must be held for tax agents as opposed to BAS Agents

This is a structurally unsatisfactory method of facilitating the provision of taxation services to the community in the most efficient way.

The object of the TASA legislation is to ensure that tax agent (and BAS) services are provided to the public in accordance with appropriate standards of professional and ethical conduct.[3] The stated methods of doing so is through the Code of Professional Conduct and the ability to impose sanctions on recalcitrant agents.

The prescriptive nature of setting out prerequisites for registration of two categories of tax agents fails to allow the development of the regulatory regime for changes in the taxation law.

It is this mischief at which the amendment is directed. However, it does not address the inherent structural inefficiency of prescribing prerequisites in the law. The prescriptive approach does not allow the Board to respond to changes in the taxation law nor technological development s or the manner in which professionals gain experience and competence to provide taxation services.

The existing approach, in all likelihood, is operating to prevent otherwise competent and professional persons of good character providing much needed assistance to the community.

The mischief identified in clause 27 should, in my view, be addressed by:

- removing from TASA and its requisitions the distinction between BAS agents and tax agents – and the proposed "tax (financial) adviser".
- Repealing the regulations that set out prescriptive rules about qualifications and experience of tax agents and BAS agents; and
- Expanding the existing item 202 in Part 2 of the TASA Regulations to state:
  - A minimum level of academic achievement (in any discipline) that is considered absolutely necessary as a prerequisite to the provision of taxation services to the community; and
  - Any other taxation qualifications that the Board considers necessary and are relevant the tax agent services that the applicant wishes to provide; and
  - The individual has been engaged in the equivalent of 12 months of full-time, relevant experience in the past 5 years

Once registered, however, the TASA allows the Board to impose conditions on the scope of the services that might be provided. These powers are already exercised for tax agents that specialise in R&D, depreciation, employment related taxes etc.

[3] Section 2-5 of TASA.

The discretion exercised by the Board in this regard ought to be subject to an AAT review.

In my submission, this is a far more productive way of addressing "specialities". And it puts the **Board in the position of administration of the registration** system rather than an enforcer of arbitrary rules.

Taxation law and practice are an area of constant change – and are more likely to involve advanced technology solutions in the future. The regulation of taxation services and service providers is not assisted by the existing, antiquated and prescriptive limitations on the persons who are able to provide services to the community.

These limitations are deadweight costs to the community.

Granting legislative power to the Board to expand the scope of services is a backward step in reform of the regime and fails to address the flaws in the law and its structure. It is **not** a solution to the mischief.

In principle, the Board ought not be given legislative power of this nature. As the present structure of the law shows – this is a problem with the legislative structure.

Background

The concept of a BAS service was introduced into the taxation law (almost a decade before TASA) at the time of the *A New Tax System* reforms in 2000. The EM accompanying the Bill that amended the tax agent provisions in the 1997 Act gave the reason for the inclusion of BAS services as:

> "2.2 Section 251L of the ITAA 1936 currently restricts a person from demanding or receiving a fee for the preparation of an income tax return or objection or the transaction of any business in income tax matters on behalf of a taxpayer, unless the person is a registered tax agent. A parallel restriction applies to FBT work under section 119 of the FBTAA 1986. As the BAS contains information about income tax and FBT matters, these restrictions mean that only registered tax agents would be allowed to prepare and lodge a BAS on behalf of taxpayers.
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> 2.3 The Commissioner is concerned about the ability of tax agents to meet the demand for this work and the consequences for small businesses of not having an agent to assist in meeting their obligations. This could lead to taxpayers falling outside of the new tax system. These concerns have been supported by statements made by tax practitioners and reports in the press.
>
> 2.4 These measures will address those concerns by allowing either members of a recognised professional association, or bookkeepers working under the supervision of registered tax agents, to provide BAS services on behalf of taxpayers. Entities that provide payroll bureau services to employers will also be able to provide BAS services in relation to PAYG withholding matters."

Consistent with the original policy for BAS preparation, the ability of BAS agents to provide taxation services was (and continues to be) limited to matters that are reported on a BAS.

The Board ought not be granted the power to extend this fundamental structure and limitation.

As an aside, I doubt that the Board would have any desire to exercise this power because the power affects the position and interests of Board members who have interests in and obligations to BAS Agent businesses. Without suggesting that the Board would be biased in making any LI in this regard, the power to determine the scope of areas of practice should not be exercised by a Board, the membership of which is drawn from persons with duties and obligations to those practices.

A similar power is proposed for financial advice services which, in my view, should not be granted to the TPB – clause 43, subsection 90-15(3).

Schedule 3

I am aware of the difference in opinions in the community concerning the provisions contained in Schedule 3 of the Bill.

The Schedule proposes to create a new and different category of taxation adviser. As is evident from my comments above, this is an extension of a legislative structure that is inefficiency and fails to secure suitably qualified, professional and competent persons to provide taxation services to the community.

In the absence of the amendments proposed in Schedule 3, financial planners that provide advice or assistance to clients that is provided in circumstances where the client can reasonably be expected to rely on the service for to satisfy liabilities or obligations or to claim entitlements that arise, or could arise, under a taxation law will be required to register as tax agents.

The problem that the structure of the law presents is in its specification of qualifications and experience because the existing regulations are not flexible enough to allow planners that are competent and professional enough to provide services to pass through the inflexible hurdles.

Once registered, however, the TASA allows the Board to impose conditions on the scope of the services that might be provided.

As indicated above, this is precisely the function that the Board should have. Its role ought to be to promote the provision of competent and ethical services to the community.

Please do not hesitate to contact me if I can provide any further information or assistance.

Yours sincerely

Michael B. Evans CA, CTA, FTI, FCPA
Registered Tax Agent