

# PETER DAVIS TAXATION & ACCOUNTING SERVICES

A Division of F P D Pty Ltd  
ABN 52 003 516 112

10 January 2009

Committee Secretary  
Senate Economics Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

## Re: Inquiry into the Tax Agent Services Bill 2008

My associate, Peter J Polgar of Peter Polgar & Associates Pty Ltd – Suite 211, 658 Pittwater Road Brookvale NSW 2100 and I make the following submission in regard to the recently introduced “*Tax Agent Services Bill 2008*” (Bill).

We are longstanding taxation professionals and in that capacity we look to the Bill to provide business certainty to taxation professionals and to ensure taxpayers are adequately protected from unsupervised, unregistered and uninsured personnel providing taxation services.

This Bill is extremely important to those involved in providing taxation services and advice. It is critical that taxpayers, as a class of consumers, are protected from those not qualified to provide taxation services. Equally critical is that taxpayers have recourse to adequate Professional Indemnity (PI), from entities providing taxation services who may inadvertently cause the taxpayer to suffer a loss.

**We therefore request that this Bill be passed urgently with a small number of amendments as outlined in this submission.**

A failure to ensure that any person “*ascertaining or advising about the liabilities, obligations or entitlements of an entity under taxation law*” is suitably qualified to provide such services, may result in errors in the preparation of tax returns, which, in turn, result in loss of revenue and increased risk of disputation with the Australian Taxation Office (ATO).

Within this context, we must state from the outset that it is extremely difficult to examine and comment fully and comprehensively in regard to the Bill without being able to review in conjunction with the Bill the associated Regulations and *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2008* (Regs & Provisions) at were previously available with earlier versions of the draft legislation. As there are constant references throughout the Bill to the regulations, this has made it significantly more difficult to comment on the Bill.

In view of the importance of the Regs & Provisions to the overall proposed reforms, we are concerned that further unintended consequences may emerge following the release of these essential legislative instruments.

Our concerns, in the majority, relate to the lack of perceived consumer protection. Any reference below to Tax Agent or BAS Agent is a reference to registered service provider under the proposed legislation.

1. **Termination of Registration on Death (Section-40-5, 40-10, 40-15)**

In the event of **Death** the Board must terminate the Registration. We believe this produces unintended consequences of:

- (i) Placing clients of the deceased Agent in limbo.
- (ii) Denying the estate of the Agent a reasonable opportunity to undertake an orderly winding up/transfer/sale of the Agent's business/practice. These unintended consequences can easily be avoided by amending the Bill to include a reasonable and effective transitional provision to enable an orderly winding up/transfer/sale of the Agent's business/practice. Such a provision would provide certainty and protection to both the consumer and the Agent.

We submit that there should be sufficient time allowed to arrange for an orderly sale or transfer of the Agent's business/practice. There should be a provision in the Bill to allow a nominated Agent either prearranged by the deceased Agent or nominated by the legal representative of the deceased Agent, to step in and continue to operate the Agent's business/practice in such a manner as to allow an orderly winding up/transfer/sale of the Agent's business/practice. This provision would not only allow the clients of the deceased Agent some continued support in finalising outstanding tax matters, in addition it would also enable the estate of the deceased Agent a reasonable opportunity to realise what may be the sole practitioner's only business asset.

The harshness of bringing a sole practitioner's business/practice to an immediate end following the death of the sole practitioner can easily be corrected by inserting a provision into the Bill that a reasonable transitional period be provided for the orderly winding up/sale/transfer of a practice/business.

We suggest the following improvements to this part of the Bill. It would be appreciated if there was some ability for a transitional provision to be inserted when an individual dies or a Corporate Nominee dies, or becomes incapacitated for some unforeseen reason.

There needs to be an allowance for the orderly disposal and/or transfer of the Agent's clients to another Agent. This would be prudent consumer protection, as well as allowing the Estate of the practitioner to realise the full value of the practice after having invested many years of effort in building the practice, only to find the practice dissolve as a result of the subsequent death of the practitioner.

The Bill states that "*The Board must terminate your registration if.... you die*". This means that the appropriate Agents' clients have no representation, placing the clients in a disadvantageous position, due to extreme and undue pressure to find a suitable replacement, without the proper and full procedures as required by the Recognised Professional Associations (RPA)<sup>1</sup> on handover of the client's tax affairs.

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<sup>1</sup> Section 251LA Income Tax Assessment Act 1936

## **2. Professional Indemnity Insurance (Section 20-30(3) Section 30-10(13))**

We believe all registered Agents must have adequate PI to provide proper consumer protection.

We note that Section 20-30(3) of the Bill states that *“the Board may, by written notice, require you to maintain professional indemnity insurance as specified in the notice”*. While there are separate Professional Standards Council (PSC) requirements in each state of Australia, and these requirements dictate the level of PI required for their respective state and territory, only occupational or professional associations can apply to the Council. The RPA’s are approved under the Professional Standards Act in each state and territory and therefore their members must adopt and maintain the required level of PI as specified by the PSC in each jurisdiction.

Where however a person providing a taxation service is not a member of an RPA covered by an approved scheme, that person must be required to hold PI. We suggest that the Bill should refer to this fact and require the proposed National Tax Agents Board (Board) to apply the appropriate level of PI for Agents who are not covered by a Scheme approved by the PSC.

We suggest that the word *“may”* should be amended to read *“must”*, being a mandatory requirement rather than the proposed optional requirement, at the discretion of the Board. This should also be applied to the transitional provisions, especially in relation to new registrations for Agents, who are not members of an RPA.

This is a major consumer protection problem for all transitional registrations and of course also when renewing existing Tax Agents who are not members of an RPA. We submit that it is essential from a consumer point of view that the Board imposes the requirement for PI on all those that provide taxation services and this would be achieved most efficiently at the time of registration and renewal of registration.

## **3. Safe Harbour from Penalties (EM Para 1.24)**

This is an important issue from a consumer protection point of view for both Tax Agents and BAS Agents. This is of major concern as there does not appear to be references in the Bill to safe harbour from penalties other than Para 1.24 of the EM.

Clients are to be provided with “Safe Harbour” from ATO Penalties where the Tax Agent or BAS Agent have made false or misleading statements or not lodged a document on time.

We would submit that the same “Safe Harbour” be provided to Tax Agents that rely on work provided from both BAS Agents and taxpayers who provide documentation and data prepared by BAS Agents, where the taxpayer has relied on the BAS Agent to supply the appropriate and correct information in a timely fashion for the Tax Agent to complete the taxpayer’s taxation affairs.

Should this not occur then the taxpayer will be forced to pay additional fees to the Tax Agent in order for the Tax Agent to review the work of BAS Agent. This cost to taxpayers will increase markedly in proportion to the data provided for the Tax Agent to review and process in order that the Tax Agent is not subject to legal action by the taxpayer as a result of possible inadequate and poor data processing by the BAS Agent, and/or the possible late presentation of such information to the Tax Agent. The likelihood of such legal action is greater where the BAS Agent or unsupervised and unregistered contractor who may be providing taxation services does not have PI, as the taxpayer may seek to sue the Tax Agent to recover any loss flowing from the BAS Agent or other contractors who may provide inadequate and poor data entry services.

As the Goods and Services Tax (GST) is a transactional tax and each and every transaction needs to be scrutinised religiously to ensure the correct and appropriate GST is applied in accordance with the GST legislation, we believe that such errors in processing will produce various results of materiality.

When processing a taxpayer's financial data and transactions on many accounting software packages, errors occur as a result of the coding for GST in the accounting software, that was originally setup at the time of installation, automatically calculates 1/11<sup>th</sup> of the total transaction as the appropriate GST. This unfortunately may not be correct due to the nature and complexity of many accounting transactions. i.e. Third Party Motor Vehicle Insurance, Insurances in general which is critical to the final production of a correct and truly presentable BAS for each taxpayer.

#### **4. Limited Registration for Specialist Advisers (Research & Development)**

From time to time, taxation laws are amended to provide tax allowances for specific and limited purposes for various classes of consumer. These particular allowances may lead to a group of advisers emerging to provide a limited specialised taxation service, restricted to the operation of the particular allowance in question.

These advisers may develop expertise in relation to the particular allowance and this expertise could be recognised by allowing limited registration for such advisers, provided that such advisers can demonstrate that they have expertise in the provision of advice in relation to the tax allowance and that they have adequate PI. Such limited registration could relate for example to Research & Development advisers who provide certain limited tax advice in this specialised area to business entities.

This may provide some limited protection, and possibly safe harbour (as noted above) to consumers under the above circumstances.

#### **5. Code of Conduct (Section 30-10(9)) & Reasonable Care (EM 3.47 – 3.54)**

It would be helpful in the Bill to have a definition in the dictionary of the precise meaning of the words "reasonable care".

Most practitioners, lawyers and consumers will have great difficulty in coping with these words, as no one will know the precise liability exposure for PI purposes. In most cases the taxpayer will fail to comply with the terminology and hence fail to obtain the Safe Harbour concessions provided for in the EM.

In short, there is considerable business uncertainty as to what is meant by the term “reasonable care” even though there are examples of what constitutes “reasonable care” in the EM, if it is not clearly defined in the Bill it does not necessarily have to be taken into account by the Courts.

We request that clear statutory guidance be provided in the Bill as to what factors or matters should be taken into account in determining what is meant by the term “reasonable care.” We are concerned that taxpayers would not be able to take advantage of the “safe harbour” from potential penalties as the taxpayer will generally not comprehend the need to provide all the necessary documentation for the Agent to competently complete and determine the taxpayers affairs.

#### **6. Correcting the Registration Classification of BAS Agents**

All entities that conduct and provide services of BAS preparation to the public at large and charge or receive a fee for such services must be registered as BAS Agents under the Bill. Accordingly, any contractor undertaking this work and charging a fee must be required to be registered and maintain adequate PI, as provided by the legislation at the Board’s direction. We submit there are many unsupervised, unregistered and uninsured personnel providing taxation services. This is detrimental to taxpayers as such personnel will make mistakes and such mistakes can lead to an under or overpayment of taxation.

It is important to understand that the Goods and Services Tax (GST) is a transactional tax and as such it requires all entities and individuals to make conscious and detailed GST technical decisions when evaluating, classifying and recording all GST related transactions and coding the chart of accounts for clients. Please note that whilst unsupervised and unregistered personnel are making decisions in relation to GST matters they are also making taxation decisions in conjunction with this process and as such should be registered.

It is a standard and fundamental requirement when building the Chart of Accounts for any entity that is registered for GST to have each and every account set up with the appropriate GST classification associated with each and every account in the client ledger. This procedure is an absolute and necessary requirement whether the client entity is using off the shelf bookkeeping/accounting software such as MYOB or QuickBooks. Each of these programs require the detailed setting up and coding of the software and the generally supplied standard Chart of Accounts before it can be used appropriately.

Having set up the Chart of Accounts in the correct and appropriate fashion, it is quite commonplace to find the need to insert new account classifications and therefore code such accounts with the correct GST code and all such transactions associated with such new accounts in the future. This procedure if carried out by a bookkeeper and if the bookkeeper charges for such services in conjunction with providing BAS services the Bookkeeper should be required to be registered under the Bill as a BAS Agent and comply with all the requirements under the Bill.

#### **7. General**

We draw the committees’ attention to our concern that there appears to be a lack of awareness within the Tax Agent community at large of the full impact of this important and timely legislation. We note that many of the RPA’s spent a considerable amount of time travelling around the country in an endeavour to obtain their members’ input in to the Bill.

These events were very poorly attended by members of the RPA's and we see this as a great disappointment and supports our concern that these members really do not understand the full obligations and commitments required by this Bill. The Government needs to focus attention on educating the tax profession about this important legislation.

We believe that both the previous Government and current Government have both missed the opportunity to ensure that there is a complete regulatory framework in relation to those providing taxation services and advice. We note that in previous versions of the Bill and the associated documents, there is no requirement for registration for sub-contractors (not an employee) providing data entry services.

While this may have been due to the fact that the Board would not have the infrastructure to cope with such a potential and initial large number of registrations, it does raise the issue that the Board must be adequately funded and resourced to fully discharge its responsibilities.

We welcome the opportunity to make personal representations in regard to this submission as and when the committee arranges the appropriate hearing in Canberra, we wish to provide evidence in person before the committee. We look forward to liaising with the Committee Secretary in this regard.

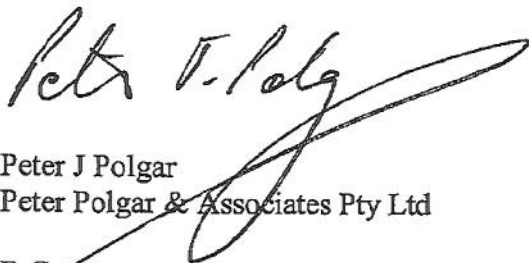
We the undersigned, Peter Davis and Peter Polgar, hereby consent and agree to this submission being released as a public submission and placed on the Committee's website.

Yours faithfully



Peter Davis

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