

Ref: NPP02408

Via email: economics.sen@aph.gov.au

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hawkins

TAX AGENT SERVICES BILL 2008

The Law Council of Australia notes that on 26 November 2008, the Senate referred the provisions of the *Tax Agent Services Bill 2008* to the Senate Standing Committee on Economics for inquiry and report by 12 February 2009.

I have pleasure in enclosing a submission which has been prepared by the Taxation Committee of the Business Law Section of the Law Council of Australia. Owing to time constraints, it has not been reviewed by the Directors of the Law Council of Australia Ltd.

The submission deals with matters that the Law Council of Australia has recently raised with the Hon Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy & Consumer Affairs.

The Law Council of Australia is thankful for the opportunity to lodge a submission. If you have any questions relating to the submission, in the first instance please contact Mr Murray Hawkins, Director National Legal Project, on telephone [02] 6246 3734 or via email at murray.hawkins@lawcouncil.asn.au.

Yours sincerely



Bill Grant
Secretary-General

12 January 2009

Law Council of Australia Taxation Committee, Business Law Section

Submission to the Senate Standing Committee on Economics Inquiry into the Tax Agent Services Bill 2008.

1. Introduction

- 1.1 The Taxation Committee, Business Law Section of the Law Council of Australia would like to thank the Senate Standing Committee on Economics for the opportunity to comment on the Tax Agent Services Bill 2008 (the "Bill").
- 1.2 The Taxation Committee fully supports the stated objectives of the Bill as ensuring that tax agent services are provided to the public in accordance with appropriate professional and ethical standards. In particular, we support the introduction of a Code of Professional Conduct.
- 1.3 However the Taxation Committee is of the opinion that the proposed section 50-30 may have unintended and undesirable consequences. As currently formulated, the proposed provision would prohibit a registered tax agent from signing a statement or declaration in relation to a document that was prepared by an Australian legal practitioner as a legal service that the practitioner is permitted to provide under a State law or Territory law that regulates legal practice and the provision of legal services. This is not intended to be an outcome of the proposed legislative regime. Consequently an amendment is required to ensure that that unintended consequence does not arise.
- 1.4 For this reason the Taxation Committee believes it is necessary to amend proposed section 50-30 of the Bill.
- 1.5 Specifically, the Law Council of Australia recommends that proposed section 50-30 be amended by adding the following sub-section:
 - (6) Subsections (1) to (4) do not apply if you prepared that document, or instructed another entity to prepare that document, as a legal service where the entity preparing the document is not prohibited from providing that document as a legal service under a *State law or *Territory law that regulates legal practice and the provision of legal services.

2. Submission

2.1 Context

- 2.1.1 The Explanatory Memorandum to the *Tax Agent Services Bill 2008* sets out the objective of the proposed legislation - to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards. This is to be achieved through a number of

reforms, including enhanced registration and regulation of tax agents and entities providing Business Activity Statement (BAS) services; a wider and more flexible range of disciplinary sanctions which may be imposed by the national Tax Practitioners Board; and civil penalties and injunctions to replace criminal penalties for certain misconduct by agents and unregistered entities.

2.2 Entitlement to provide tax agent and BAS services – regulatory exclusions under the Bill

2.2.1 At the core of the Bill (proposed section 50-5) are the general prohibitions upon persons providing a tax agent service or a BAS service for fee or reward when not a registered tax agent or BAS agent, as appropriate.

2.2.2 Paragraphs 50-5(1)(e) and 50-5(2)(d) continue the long established exception that tax agent and BAS services, other than preparation and lodgement of returns, can be provided by legal practitioners as legal services without the need for the practitioner to be registered as a tax agent.

2.2.3 The means adopted in proposed section 50-5 of the Bill to achieve this end is, broadly, to identify two categories of service that legal practitioners provide and to regulate one of them under the Bill.

(a) The first category is a service that involves preparation and lodgement of tax returns, BAS returns and statements in the nature of those returns. As is the case under the present regime, anybody, including legal practitioners, who provides this type of tax agent service will (except in a limited range of circumstances) need to be registered as a tax agent.

(b) The second category relates to other kinds of services that are provided as a legal service. For these services the proposed regime will provide that the general prohibitions do not apply where the provider of the tax agent service or BAS service is entitled to provide that service as a legal service under a State law or Territory law that regulates legal practice and the provision of legal services.

2.2.4 Further, the exclusions in the *Tax Agent Services Bill 2008* recognise the separate regulation of the legal practitioners and the regulatory law reforms undertaken by the States and Territories (though the agreement of the Standing Committee of Attorneys-General) to introduce comprehensive and consistent laws to improve and strengthen the regulation of the legal profession and the provision of legal services. (All States and Territories, with the exception of South Australia, have enacted a new *Legal Profession Act* to give effect to these reforms).

2.3 Section 50-30 of the Bill

2.3.1 Proposed subsections 50-30 (1) to 50-30(4) of the Bill provide, in essence, for contraventions where a registered tax agent or BAS agent signs a declaration or other statement in relation to a taxpayer and that declaration or statement is based on a document that was prepared by an entity other than: the registered tax agent or BAS agent; someone else who is a registered tax agent or BAS agent; or, someone else who is working under the supervision or control of a registered tax agent or BAS agent.

2.3.2 When considered in their own terms, it is clear that proposed subsections 50-30 (1) to 50-30(4) impugn the act of a registered tax agent or BAS agent signing a statement or declaration based on a document prepared by someone who is not subject to the proposed tax agent regime. We understand that the provisions are intended to be directed to the preparation of tax returns and BAS returns by non-registered tax agents and BAS agents, but for reasons outlined below they may have a much broader application.

2.3.3 Proposed subsection 50-30(5) provides that the penalties do not apply if the registered tax agent or BAS agent takes reasonable steps to ensure the accuracy of the document. However, in civil penalty proceedings, the registered tax agent or BAS agent bears the evidential responsibility of proving that reasonable steps were taken to ensure the accuracy of the document. (Our suggested change does not exempt the registered tax agent or BAS agent from all responsibilities for documents prepared as legal services – it merely ensures that those responsibilities are properly dealt with under the general “Code of Conduct” provisions of the Bill rather than also under the inappropriately harsh rules in section 50-30).

2.4 Concerns with proposed section 50-30

2.4.1 The Law Council has a number of concerns with proposed section 50-30 of the Bill.

2.4.2 We note that liability to penalty under the proposed section can apply to a registered tax agent or BAS agent who signs a statement or declaration based on a document prepared by an Australian legal practitioner (for example, an objection to an assessment) unless the Australian legal practitioner that prepared that document is also a registered tax agent or BAS agent, or works under the control or supervision of a registered tax agent or BAS agent.

2.4.3 The Law Council view is that the practical outcome of proposed subsections 50-30(1) – 50-30(4) will be that the ordinary position of a registered tax agent or BAS agent engaging an Australian legal practitioner to provide an advice, opinion or other legal services which might lead to the agent making a declaration or statement in a particular way will expose the agent to penalty if the legal practitioner is not also a registered tax agent or BAS agent. This outcome would conflict with the policy expressed in proposed paragraphs 50-5(1)(e) and 50-5(2)(d) that a person who is entitled to provide a tax agent service or BAS service as a legal service under a State law or Territory law that regulates legal practice and the provision of legal services may provide that legal service without being registered as a tax agent or BAS agent.

2.4.4 As mentioned, proposed subsection 50-30(5) provides a registered tax agent or BAS agent with a “defence” in relation to a statement or declaration that he or she “took reasonable steps to ensure the accuracy of the document.” Paragraph 4.58 of the Explanatory Memorandum states that the “taking of reasonable steps could be demonstrated by evidence that the agent reviewed the document before signing it or by evidence of appropriate alternative review or monitoring arrangements.” However, it does not provide appropriate protection for a registered tax agent or BAS agent who has sought advice from a legal practitioner concerning the operation of the law.

2.4.5 The Law Council is also concerned that the words “declaration”, “statement”, and “document” are not defined for the purposes of proposed section 50-30. The taxation laws embrace many different kinds of statements, declarations and documents in addition to tax returns.

2.4.6 By way of example, subsection 8J(2) of the *Taxation Administration Act 1953* (which deals with offences relating to statements, records and certain other Acts) contemplates that a “statement” includes a statement:

- (a) made in an application, certificate, declaration, notification, objection, return, claim or other document made, prepared, given or furnished, or purporting to be made, prepared, given or furnished, under or pursuant to a taxation law; or
- (b) made in an instrument lodged for assessment under or pursuant to a taxation law; or
- (c) made in answer to a question asked of a person under or pursuant to a taxation law; or

- (d) made in any information furnished, or purporting to be furnished, under or pursuant to a taxation law; or
- (e) made in a document furnished to a taxation officer otherwise than under or pursuant to a taxation law.

2.4.7 Given the breadth of meaning given to the word “statement” in section 8J(2) of the *Taxation Administration Act 1953*, the Law Council view is that it would clearly be unwise to rely on informal advice (for Example 4.15 in the Explanatory Memorandum) that proposed section 50-30 is directed only to tax agents who sign declarations on tax returns or BAS statements not prepared by a registered tax agent or BAS agent, without taking reasonable steps to ensure the accuracy of the tax return or BAS statement in question. Under the section as presently drafted, registered tax agents or BAS agents who sign a statement or declaration after having received legal advice or legal services in the course of preparation will also be exposed to the risks of contravention referred to above.

2.4.8 As proposed section 50-30 is presently drafted, similar concerns arise where a multidisciplinary partnership properly provides legal services to its clients but also happens to be a registered tax agent or BAS agent.

2.5 Recommendation

2.5.1 For the reasons set out above, the Law Council recommends that an additional provision be added to section 50-30, in terms set out in paragraph 1.5, above to ensure that documents prepared by Australian legal practitioners as a legal service do not come within the scope of the penalties against registered tax agents or BAS agents as contemplated in subsections 50-30(1) – 50-30(4).
