



ASSOCIATION OF CERTIFIED BOOKKEEPERS INC.

ABN 48 379 719 471

SUBMISSION ON THE EXPOSURE DRAFT TAX AGENT SERVICES BILL 2008 AND RELATED REGULATIONS

The Association of Certified Bookkeepers Inc. (CBK) welcomes the opportunity to provide a further submission into the ongoing development of the exposure draft legislation and regulations regarding BAS Agents as part of the Exposure Draft Tax Agent Services Bill 2008 and Related Regulations.

Under the new arrangements, in addition to tax agents and their nominees, BAS agents and their nominees will also need to be registered. BAS agents will be governed in the same way as tax agents, but will provide a limited range of services relating to tax laws relevant to BAS.

Tax agents, BAS agents and the nominees of tax agents and BAS agents are collectively referred to as tax practitioners.

Under the proposed legislation organisations which satisfy the requirements of Recognised Professional Associations, including any Recognised BAS Agent Associations, RTOs and other tertiary institutions may assist the Board by providing Board recognised courses for ongoing professional development and disciplinary purposes.

The scope of registration has been widened to include BAS agents in order to improve the overall standards of BAS agents, in recognition of the important role they play in the current tax system.

Rather than complete an exhaustive document the CBK has decided to comment on areas that may impact on bookkeepers or BAS agents that form CBK membership.

The CBK has taken part in the confidential consultations as part of the ATO Bookkeepers Advisory Group over the past 5 years and supports any act that brings more value and professionalism to the bookkeeping profession.

The CBK was incorporated in October 2003 as a professional association for bookkeepers who are self employed, or working in public practice or commerce as support staff to qualified accountants, tax agents and business owners. Many bookkeepers do not want to be accountants as they have their own special interests and needs.

The CBK is pleased to see within the proposed framework a number of worthwhile measures including the ability of a greater range of appropriately qualified and experienced tax professionals to become registered tax agents or registered BAS agents.

The CBK is pleased to see the raising of standards for BAS agents (usually bookkeepers) through registration and regulation. However, apart from the recognition of professional associations of BAS agents there is nothing to encourage bookkeepers or BAS agents to join any of the professional associations of BAS agents (bookkeepers).

These organisations of bookkeepers, which are not Recognised Professional Associations for tax agent registration purposes, can do nothing apart from training and professional development of their members.

What is a BAS service?

Section 90-10 Meaning of BAS service.

(1) a BAS service is defined to be a tax agent service;

(a) that relates to:

- (i) ascertaining the liabilities, obligations or entitlements of an entity that arise, or could arise, under a BAS provision; or*
- (ii) advising an entity about the liabilities, obligations or entitlements of an entity or another entity that arise, or could arise, under a BAS provision; or*
- (iii) Representing an entity in their dealings with the Commissioner in relation to a BAS provision; and*

(b) that is provided in circumstances where the entity can reasonably be expected to rely on the service.

(2) a service provided by a person in the course of performing duties in the ATO is not a BAS service.

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

Many tax agents believe the term 'BAS provision' is effectively defined to mean the provision of services and related GST taxable items necessary to complete and lodge a BAS return.

These items include the collection and recovery of tax provisions in Part VII to the Fringe Benefits Tax Assessment Act 1986. It also includes the indirect tax law which means the GST law, the wine tax, the luxury car tax and the fuel tax law as defined in section 995-1 of the ITAA 1997 and parts 2-5 and 2-10 in Schedule 1 to the TAA 1953 (the PAYG system).

Many tax agents believe that the above definition is too wide as it is not limited to the preparation of a BAS Return, but also allows BAS agents to provide advice on complex indirect taxes such as GST for which they do not have the required technical expertise. It was recommended in our former submission to Treasury (10/08/2007) that the term BAS service be amended to BAS Agent so that it is related to the compilation of a BAS and related items and compliance issues.

This would not allow BAS Agents to provide detailed advice on GST and other tax matters.

Advice on any other tax law or matter can only be given by a registered tax agent.

Many tax agents and bookkeepers consider the previous 2007 draft legislation to be confusing and misleading. Many considered that the term "BAS Service Providers" would confuse members of the general public when considering using the services of a registered tax agent or a BAS service provider. The CBK considered the term BAS service provider was not the correct term to use for what are predominately bookkeepers.

Members of the public are generally aware that there is a significant difference between a tax agent and a bookkeeper.

The CBK is pleased to see the term BAS service provider has been replaced by the more appropriate term BAS agent.

The introduction of registration of BAS agents is a recent innovation and is designed to bring into the framework those suitably qualified bookkeepers to assist those overworked accountants and taxpayers to meet their BAS obligations. The CBK supports this proposal but stipulates that BAS agents (usually Bookkeepers) are not Tax agents and usually do not have the same qualifications as Tax Agents and accountants.

Bookkeepers have for too long been, unrepresented, unregulated and unrecognised for the valuable work that most of them do. Certainly there are unscrupulous bookkeepers just as there are unscrupulous accountants and BAS preparers.

As a result the proposed legislative requirements regarding acceptable qualifications for registration as a BAS agent are not as onerous as those for tax agent registration. Nor should they be.

The proposed legislative framework recognises that there are professional associations of BAS agents and that these associations must meet certain criteria for recognition.

In a previous submission by the accounting bodies it was suggested that the minimum required voting members of a Recognised BAS Agent Association be set at 1000 voting members (or a lesser number) at the discretion of the Board or the Minister.

The Draft Tax Agent Services Regulations 2008 in Part 2 para 202(b) expands this further by stating at **least 500 voting members who are BAS agents registered under the ACT; or both.**

There are several associations for BAS agents (usually a bookkeeper association) and with the relatively new entry of these organisations to the professional services sector it is extremely unlikely that any of the bookkeeper (BAS) associations would meet the minimum number of 1000 voting members and/or 500 voting members who are BAS agents registered under the Act, to gain recognition as a Recognised Association of BAS Agents.

The CBK therefore recommends that the minimum number of voting members of a Recognised BAS Agent Association be amended by the addition of a subparagraph allowing the Minister (or the Board) to approve a lesser number of voting members or registered BAS agents during the transition period. This will allow those BAS Associations who meet all of the other requirements except for the required number of members to be approved.

Bearing in mind that the proposed framework recognises the existence of these associations there is nothing within the framework to encourage BAS agents to join such organisations. If the Government is serious about regulating BAS agents as separate entities from RPAs there must be some benefit, apart from training or education in the legislation to encourage bookkeepers or BAS agents to join such organisations.

If there is no benefit, perceived or otherwise, within the legislative framework than the very people the legislators want to regulate will register as BAS agents but will not join one of the Recognised BAS Agent Associations, because they can see no value in doing so.

The CBK supports the requirement for tax agents and BAS agents to have an acceptable level of professional indemnity insurance. [Section 20-30(3)]

The CBK raises the following issues of concern:

The Code of Professional Conduct.

We accept that one of the aims of the proposed legislation is to provide greater consumer protection. If the public want to have confidence in the tax industry/profession to help them meet their own tax obligations, it is vital that the tax industry/profession is

able to match community expectations. It is assumed that BAS agents will be or are part of the tax industry/profession.

We also accept that the proposed Code of Professional Conduct is a positive step to introduce minimum standards in the tax industry/profession.

The Code of Professional Conduct governs all registered tax agents, BAS agents and their nominees. The Code establishes the professional and ethical standards required of tax agents, BAS agents and their nominees.

Our major concern with respect to the proposed Code of Professional Conduct is how it can be administered and applied in practice. The proposed Code of Professional Conduct, we consider still, transfers too much responsibility under self assessment onto BAS Agents as well as tax agents.

Unfortunately the EM contains guidance that lack practical application and therefore creates significant uncertainty and risk for tax agents and BAS agents as to how the new regime will operate.

We note that the Board can later develop guidelines on how the Code of Professional Conduct is to be applied in practice. We are concerned that the proposed Bill uses principle based drafting which places heavy reliance on the EM to fill any gaps and to give meaning to the proposed legislation.

Such gaps in the legislation should not be left to the Board to consider without suitable direction. The use of principle based drafting creates uncertainty for tax practitioners (including BAS agents).

It is possible that the courts could interpret certain provisions based on the exact wording of the particular paragraph without any reference to further explanations within the EM.

How can tax agents and BAS agents at all times maintain the best interests of their clients when they have a simultaneous responsibility owed to their clients, the community, the Board and the ATO?

It is therefore essential that inconsistencies and contradictions within the draft legislation and the EM are removed.

In addition the examples in the EM provide some assistance on how these potential conflicts can be managed in a practical way. There needs to be a greater number of examples under each of the principles of the Code of Professional Conduct to cover a wide range of practical issues that can arise.

Most of the Code of Professional Conduct under S30-10 is so widely drafted that it could invariably be used against the tax agent or BAS agent.

Another major concern relates to tax agents and BAS agent being required to comply with a legislated Code of Professional Conduct. Unless a tax agent or a BAS agent is also a member of a Recognised Professional Association, they are not currently governed by a Code of Professional Conduct.

The introduction of a Code of Professional Conduct therefore provides an opportunity to raise standards in the industry, an aim which we support.

There are, however, a number of issues regarding the administration of the Code of Professional Conduct and how it can be applied in practice. A key point of the proposed Code of Professional Conduct is the view that the "interest of the client is paramount" yet this requirement is heavily qualified and even contradicted to the extent that tax practitioners (includes BAS agents) must have regard to responsibilities owed to the community through the law. The interests of the client are not necessarily those of the Government or the Tax Office.

There needs to be a greater number of unambiguous examples under each of the five principles of the Code of Professional Conduct to cover a wide range of practical issues that could arise.

Safe Harbour & Obligations under the Code of Professional Conduct

In order for taxpayers not to be liable for certain tax shortfall penalties when they engage a BAS agent or a tax agent to do BAS related services they need to demonstrate that they have provided all the relevant BAS related taxation information.

Our concern is how will taxpayers and BAS agents who are not tax experts know what they would reasonably be expected to provide?

The taxpayer has an obligation to bring to the BAS agents attention all the information which they would reasonably expect to be necessary to complete a BAS return. The use of subjective statements has the potential to introduce administrative difficulties in the application of this measure.

If this is the case why is it the obligation of tax agents and BAS agents to take reasonable care to ascertain the true state of affairs of the client and impose a similar obligation on the accuracy and completeness of the information provided to them?

These obligations will impose significant responsibilities on BAS agents. In effect the BAS agents will be required to conduct a quasi audit on each of their clients.

How else can BAS agents assure themselves that the information provided represents the true state of affairs?

In our submission to Treasury in August 2007 and again in June 2008 the CBK considered that the above obligations and other issues needed further explanation.

Other issues such as:

- What will you need to show to prove you have undertaken reasonable care?
- What information can a tax agent or a BAS agent rely on without further checking being required?

The EM at Para 3.47 states **“When providing tax agent services that involves a statement being made to the Commissioner or something else is done on behalf of a client, tax agents and BAS agents must take reasonable care in ascertaining the facts around their client’s affairs that are relevant to the service being provided [Subsection 30-10(9)]”**

Para 3.49 of the EM explains that this reasonable care is only applicable if it is relevant to the service that they (the tax agent or BAS agent) have been engaged to provide.

The EM at para 3.51 states **"The provision focuses on the requirement for agents to take reasonable care. Although tax agents and BAS agents are not responsible for the veracity of the tax information provided to them by their clients, they are required to do what is reasonable in the circumstances"**

The EM at para 3.52 states **" In many cases, taking reasonable care means that agents must ask the appropriate questions, based on their professional knowledge and experience, in seeking the information. Where there are grounds to doubt the information provided by a client, the agent must make reasonable enquiries as to the completeness or correctness/accuracy of that information."**

The EM at para 3.53 states **"Where a statement provided by a client seems plausible, is consistent with previously established statements and the agent has no basis to doubt the client's reliability or the veracity of the information supplied, the agent may discharge its responsibility by accepting a statement provided by the client without further checking."**

The EM continues to provide further guidance in the area of reasonable care in paragraphs 3.39 to 3.59 inclusive.

These paragraphs solve the majority of questions raised by the CBK in our previous submissions.

The CBK considers it is essential that "safe harbour" provisions be included for registered tax agents who use a BAS agent to provide BAS services on their behalf. The same "safe harbour" provisions should apply where a client has used the services of a BAS agent and gives that work to a tax agent for the purpose of preparing a tax return or other tax agent services.

This ensures that the tax agent is not penalised for any errors made by the BAS agent who will be subject to the same Code of Professional Conduct.

Further there are commercial realities to consider. Will taxpayers be prepared to pay for what will be required by BAS agent in order to comply with the Code of Professional Conduct?

The introduction of "safe harbour" provisions for tax agents using BAS agents will go a long way towards making compliance easier for all parties involved and protect the consumer at the same time.

The CBK in our previous submission sought a detailed explanation of the term 'sufficient resources'.

It would seem the 'sufficient resources' requirement was so wide that the Board could determine how a company or partnership can run its business as a tax agent or a BAS agent. This is clearly not a role for the Board whose role would be significantly stretched if it is expected to monitor compliance with this requirement.

The 2008 Exposure Draft and the EM seem to solve most of the concerns the CBK had regarding 'sufficient resources'. There is now more specific guidance to proposed applicants for registration as BAS agents, tax agents and the Board on how this requirement can be met as it is not an existing requirement for registration as a tax agent.

Independence of the new Tax Agents' Board

The EM makes it quite clear that the Board should be independent from the ATO; there are instances where the ATO has to be relied upon to provide administrative support.

The EM states that the proposed new Board is a statutory body that falls within the Treasury portfolio and its statutory functions and powers are vested in the Board independently of the ATO and the ATO cannot interfere with the Board's performance of those functions and powers.

The existing administrative arrangements between the state based Tax Agents' Boards and the ATO has created an impression amongst tax agents, BAS preparers and taxpayers alike that the boards are part of the ATO. It is important that the independence of the new Boards from the ATO is established from the very beginning.

The CBK supports the concept of replacing state based Tax Agents' Boards with a national Board but we are concerned with the issue of independence. The legislation must ensure that both the Board, and the persons who assist the Board in its administrative functions, are independent of the ATO so as to preserve the independence of the new Board.

Anything less only reinforces the current perception that the Board is only a separate arm of the ATO.

Examples where independence may be compromised;

- ATO to provide administrative support to the Board. If independence is to be preserved then the Board should not seek administrative support from ATO.
- The appointment of a Secretary of the Board is to be undertaken by the Commissioner of Taxation. It is the Board's secretariat which will initially be investigating complaints by third parties about a tax agent or a BAS agents conduct.
- Investigative committee/s empowered to undertake investigative work can consist of ATO personnel. A committee may be made up of one person or more as the Board determines appropriate. The potential exists for a one member investigative committee to undertake an investigation.
- Board members appointed by the Minister may be ATO personnel.

In order for the Board to be perceived and to act independently, it is important that any functions the Board undertakes under the new legislative framework are performed by non ATO personnel. Having substantial links back to the ATO will do nothing to reverse the perception that the Board is merely an arm of the ATO.

Investigative Committees

The proposed establishment of investigation committees to investigate complaints is another concern. Most professional bodies who have codes of conduct have trained staff to undertake necessary work to investigate complaints. There are no assurances that investigative committees will act consistently when they undertake investigation procedures and there is a potential that ad hoc investigative committees will lead to different outcomes for similar factual situations. To maintain independence, investigative personnel should not be sourced from ATO personnel. Given the potential sanctions that

may be imposed by the Board, it is imperative that the investigative process operate to produce fair, transparent and consistent outcomes.

The initial contact point for the communication of a complaint will be with the Board Secretariat who also happens to be ATO person appointed by the Commissioner of Taxation. It is then up to the Secretariat to bring the matter to the attention of the Board to decide whether the complaint is one of substance and whether an investigation is warranted. The issues we have with respect to the investigative process are as follows:

- Investigative committee members are not full time expertly trained persons.
- The ad hoc establishment of investigative committees as and when needed arises from an established pool of people.
- ATO officials may be selected as investigating committee member/s.
- An investigative committee can consist of one person.

Given that the Board or investigating committee is not bound by the rules of evidence, and the investigations are to be conducted with as little formality as possible, it raises fears as to whether this process will result in satisfactory outcomes for BAS agents and tax agents. Given the sanctions that can be imposed we believe that it would be more appropriate to have full time suitably qualified persons who undertake necessary investigative functions.

We recommend that only individuals who have years of practical experience should be persons who undertake these investigative tasks.

Transitional Measures

There are no transitional measures to assist tax agents in making necessary changes to improve standards. The proposed new regime will force some tax agents to improve their standards and this can only be a good thing for the profession in the long run but it will also put pressure on fees charged to lodge tax returns and related services etc.

There has to be a transition period to allow the profession to undertake necessary changes regardless of what form and shape the new legislative framework ends up looking like.

There are however special rules relating to provision of BAS services by certain individuals if

- (a) immediately before the transition time the individual was providing exempt BAS services; and
- (b) during the 2 years beginning at the transition time, the individual provides a BAS service; and
- (c) at the time of provision of the BAS service, the individual is a person referred to in subsection 251L (6) of the ITAA 1936 as in force immediately before the transition time.

Further conditions are detailed in the Transitional provisions subsection 4(2)1-3) of the exposure draft.

Training

The EM states that organisations which satisfy the requirement of Recognised Professional Associations, RTOs and other tertiary institutions may assist the Board by providing Board recognised courses for on-going professional education and disciplinary purposes.

Given the amount of consultation that this Bill has been given and the amount of time (17 years) that the proposed legislative changes have been under development, it is heartening to find such a large number of improvements over the previous Exposure Drafts.

The CBK supports the majority of the provisions within the Exposure Draft subject to minor improvements in the proposed bill before it is finally legislated.

The CBK suggests that a review of the legislation once enacted be undertaken within a 2-3 year time period to determine if any minor amendments are needed to correct any unforeseen problems that may occur.

If you would like to discuss any aspect of this submission please contact the writer on 02 9744 6799.

Yours sincerely,



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12th January 2009