The Institute of Chartered Accountants in Australia

14 January 2009

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

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

Dear Mr Hawkins

SUBMISSION TO THE INQUIRY INTO THE DRAFT TAX AGENT SERVICES BILL 2008 AND EXPLANATORY MEMORANDUM

The Institute of Chartered Accountants in Australia (the Institute) welcomes this further opportunity to provide comments to the Senate Economics Committee (the Committee) on the final draft Tax Agent Services Bill 2008 (the Bill) and Explanatory Memorandum (EM).

The Institute is the leading professional accounting organisation in Australia, representing over 48,000 members in public practice, commerce, academia, government and the investment community. The Institute's members are advisers to businesses at all levels, from small and medium sized businesses to the largest global corporations operating in Australia and overseas.

We remain strongly committed to the earliest possible introduction of a national regime for the regulation of tax agents and BAS agents. We are keen to ensure that a robust regulatory regime is established and implemented efficiently so as to place the tax profession in a healthy and strong position for generations to come.

The Institute acknowledges and appreciates the extensive consultation process that has been undertaken by the Governments and Treasury with the profession in the course of developing the draft legislation and EM to its current form. Numerous amendments and improvements to the policy and drafting were required in respect of earlier exposure drafts, and since that point significant enhancements and clarifications have been incorporated into the current draft of the proposed legislation and EM.

We appreciate the difficult task that the drafters have had in ensuring that all applicable regulatory concerns are appropriately addressed in the draft Bill and EM. The Institute applauds the legislators for their drafting efforts in crafting a regulatory framework that we consider should be workable and effective – a suite of well-measured standards to achieve an appropriate level of professionalism, yet sufficiently flexible to accommodate commercial realities in the profession.

33 Erskine Street
Sydney NSW 2000
GPO Box 3921
Sydney NSW 2001
service> 1300 137 322
phone> 61 2 9290 1344
fax> 61 2 9262 1512

27–29 Napier Close
Deakin ACT 2600
phone> 61 2 6282 9600
fax> 61 2 6282 9800

L32, 345 Queen Street
Brisbane Qld 4000
phone> 61 7 3233 6500
fax> 61 7 3233 6555

L11, 1 King William Street
Adelaide SA 5000
phone> 61 8 8113 5500
fax> 61 8 8231 1982

TCCI, 30 Burnett Street
North Hobart Tas 7000
phone> 1800 014 555
fax> 61 3 9670 3143

L3, 600 Bourke Street
Melbourne Vic 3000
phone> 61 3 9641 7400
fax> 61 3 9670 3143

Grd, 28 The Esplanade
Perth WA 6000
phone> 61 8 9420 0400
fax> 61 8 9321 5141

The Institute broadly supports the Bill and EM in its current form. We do, however, wish to take this opportunity to raise several submission points for the Committee's consideration. We consider that the submission points raised in the following pages will further improve the proposed legislation and EM prior to its finalisation. Our submission points either identify issues with new aspects of the Bill and EM, or reiterate fundamental concerns we have previously stated which we consider remain unresolved. The aim of our submission is to remove anomalies that we believe exist in the operation of the proposed law and EM, or to ensure uncertainties are clarified.

Our submission points are as follows:

Supervision and control

- Outsourcing

  We acknowledge and appreciate the express clarification that has been provided in the EM (at paragraph 2.34) that outsourcing is permissible, subject to appropriate "supervision and control" being in place or adequate review being undertaken by the registered tax agent (paragraphs 3.42 - 3.44 and Example 3.11). This appears to largely address the concern under section 50-30 for registered tax agents outsourcing to unregistered service providers. In practice, however, we note for the Committee's reference, that there may be circumstances where outsourcing occurs within the broader organisational structure of a professional services firm where there is neither strict "supervision and control" nor a specific review of work necessary due to the high level and extent of training and protocols implemented around the return preparation process. These protocols include the use of standard checklists prepared and maintained by the tax agent, the purpose of these being to formalise the process for preparation and review of returns, and quality control review procedures incorporating random sampling of returns prepared for the tax agent. We would appreciate if this situation could be accommodated in the EM and expressly acknowledged as permissible provided training and controls (such as sampling, test checking, self-audits) are sufficiently robust as to amount to the taking of "reasonable steps" for the purposes of subsection 50-30(5) of the Bill.

  In relation to outsourcing, we have a further residual concern in terms of the interaction between the definition of "tax agent services" and the registration provisions. Specifically, we submit that it is unclear as to when an entity that is engaged to provide 'outsourced' services to a registered tax agent will themselves be required to register as a tax agent. This arises because there is uncertainty as to when an entity (i.e. the client whose tax obligations are the subject of the service) can "reasonably be expected to rely on the service" that is provided by the outsourced service provider. We consider that the new Example 3.11, which is about payroll-related services, is illustrative of the 'grey' or 'fuzzy' boundaries on this issue. There is difficulty in practice in applying a test based on a 'reasonable expectation of reliance' to determine an entity's obligation to register as a tax agent. This issue is also discussed in further detail below in the broader context of service trusts and corporate groups, for which it is particularly problematic in its application.

- "Supervision or control" expression

  We note that the expression "supervision **or** control" appears to have been inadvertently used in subsections 50-30(1) and (2), subparagraphs (c)(iii) respectively. With respect, we anticipate that the drafters intended to use the expression "supervision **and** control" for consistency with other references in the Bill, and in line with the common law expression. We recommend that the draft legislation be amended accordingly.

Registration – Service trusts, corporate groups and partnerships

- Service Trusts

  As mentioned above, the Institute has a residual concern with the operation of the registration rules and the definition of "tax agent services" in the context of services provided by service trusts. We wish to reiterate this issue as we consider it to be a legitimate concern which has far-reaching implications in practice for the tax profession due to the wide-use of service trusts by partnership structures of all sizes. The EM includes a new example, Example 4.4, which deals specifically with service trusts in the context of civil penalties and conduct prohibited without registration.

  In Example 4.4, which is about ZARA Service Trust and Thomas & Partners, the EM concludes that ZARA Service Trust is providing tax agent services because it is reasonable to expect that Thomas & Partners or its client would rely on the services provided by the employees of ZARA Service Trust. Accordingly, the EM states that at least one of the trustees of ZARA Service Trust must be a registered tax agent in order to avoid breaching a civil penalty provision.

  We have a number of concerns about this example and its conclusion as, with due respect, we consider that it is flawed in its analysis of the service trust relationship with the partnership, and the nature of the services provided by the service trust.

  We submit that there is a fundamental difference between the service trust arrangement and other arrangements involving 'outsourcing' of the provision of professional tax services. In a service trust arrangement, we consider that the better view is that the service trust should be regarded as acting as agent on behalf of the partnership, not as a principal providing "tax agent services" in its own right. Generally the engagement letter to provide tax services is between the partnership and the client. Such engagement letters typically contain terms which expressly confirm that the client is relying on the advice of the partnership and may go as far as to provide that, whilst the partnership will remain responsible for the services requested by the client, the partnership may use the services of contractors to deliver the services requested. In these circumstances the service trust is or should be viewed as acting in the capacity as agent of the partnership. As acknowledged in Example 4.4, the service trust is providing nothing more than staff as contractors, and therefore the service for which it receives a fee from the partnership is in the nature of a labour service, rather than a professional tax service.

  Beyond the technical concern with the conclusion in Example 4.4, the service trust example provides an impractical outcome for the profession. In practice, it is likely that there will be prohibitive commercial reasons for which professional services firms will not be able to obtain registrations for the trustees of their service trusts. Both technically and pragmatically, therefore, we submit that Example 4.4 in the EM should be amended to reflect the 'agent' relationship between a partnership and the service trust, and accordingly should reach the conclusion that the service trust is not required to register as a tax agent.

- Corporate groups

  Example 4.5 in the EM is a further new example which deals specifically with tax services provided within corporate groups. This new example is about XC Pty employing Bob as tax manager to provide services for XC Pty and all companies of the wholly-owned corporate group. The EM concludes that Bob is providing tax agent services because the related companies rely on the advice, and when XC Pty charges an intra-group fee to recover the costs from those related companies, XC Pty is in breach of the civil penalty provision for providing tax agent services while unregistered.

We have a number of concerns regarding this example and its conclusion. With due respect, we consider that the conclusion reached is an impractical and uncommercial outcome for corporate groups. The Institute agrees that the drafting of the legislation is sufficiently broad to capture this scenario and that it is potentially a technical problem which needs to be resolved. However, as previously submitted, we consider that the intent of the legislation is not to create the outcome where in-house tax managers are required to be registered tax agents in order to provide in-house advice within the corporate group. We submit that this would create an unintended result which would be absurd since the rationale for employing in-house tax managers is in part to alleviate the need to engage external tax agents.

Accordingly, we would request that the Committee amend Example 4.5 to confirm that this scenario is intended to be an exception, whereby either the intra-group cost recovery is not regarded as a "fee" since it is an internal, non-commercial recharge between related entities, or alternatively the services are not regarded as "provided" to another entity as they are within the corporate group (i.e. the group is viewed as one entity). The alternative is to specifically exclude arrangements between wholly-owned or majority-owned group companies (sufficient common ownership for grouping for tax purposes) from being tax services. As previously submitted, this could be achieved through a simple Regulation.

- Comparison of key features of new law and current law

  We note that partnerships have been omitted from the last row of the table at page 24/25 of the EM which compares the new law with the current law in relation to registrations. The last row of the table now only deals with companies. In the prior exposure draft EM (at page 17), partnerships were also addressed. The requirement under section 20-5 of the Bill for a "sufficient number of individuals" to be registered tax agents applies equally to partnerships as it does to companies. We recommend that the Committee review this table in the EM to ensure that the comparison between the new law and current law for partnerships is addressed appropriately. If it has inadvertently been omitted, it should be re-instated.

Independence and Confidentiality

- Conflict of interest and disclosure of information

  The Institute acknowledges and appreciates the amendments in paragraphs 3.35 and 3.36 of the EM, concerning independence, which state the expected conflict of interest measures in a less prescriptive and more illustrative manner, outlining potential ways in which conflicts may be "managed", rather than requiring conflicts to be "avoided".

  We note that paragraph 3.38 in the EM is a new paragraph which relates to confidentiality and the disclosure of information. The Institute is concerned about a number of aspects of this paragraph. Firstly, we are concerned that it states that "*specific* authority" must be obtained to disclose information to a party other than the entity to whom the information relates. We note that Example 3.7 uses similar language in that it states "*explicit* permission" must be obtained. Subsection 30-10(6) states that "permission" is required. We consider that the EM raises the bar too high in requiring permission to be explicit or specific. This threshold is inconsistent with other legislation, such as the *Privacy Act 1988*, which defines "consent" to mean "express consent or implied consent". Likewise, authority at general law may also be express or implied. While we acknowledge that it is preferable for express permission to be obtained wherever possible, we submit that implied authority should also be acceptable where it can be established in the particular circumstances under a client engagement. Accordingly, the Institute would request that the references to "specific" or "explicit" be deleted or replaced with words that also cover implied authority.

Secondly, and more broadly, we are unable to discern the intended purpose of paragraph 3.38 and for this reason we consider that it needs to be re-drafted to clearly convey its desired meaning. We believe that it may be seeking to state that information relating to a client should not be disclosed by a tax agent to another entity within its organisation (for example a partnership to a service trust or outsourced service provider) or to another entity within the client's organisation (for example to another company within the corporate group), without the client's authority, unless the tax agent or client is defined in the engagement letter to include those other entities. If this is the intended purpose of paragraph 3.38, we recommend that it be amended to this effect.

Tax Practitioners Board Secretariat

- ATO administrative support

  We note that the Bill (section 60-80) continues to provide that the Tax Practitioners Board (the Board) is to be assisted by employees of the Australian Public Service (APS) whose services are to be made available by the Commissioner.

  The Institute reiterates that it is our preferred view that the secretariat/administrative support for the Board be established separately from the Australian Taxation Office (ATO), and recruited from suitably qualified persons both external to the APS and from within it. We believe that it is important from the outset to establish the independence of the Board from the ATO, consistent with the composition and establishment of the Board itself, which is to be drawn more broadly.

The Institute would welcome the opportunity to participate in any public hearing into the Bill and EM in order to elaborate on the abovementioned points which, in the short time frame for submissions, have not been dealt with in detail.

We emphasise that we have greatly appreciated being closely involved in the design of the tax agent services regulatory regime through the extensive consultation process that has been undertaken. In this respect, we wish to acknowledge the effort, persistence and hard work of the Governments and Treasury in bringing the legislation and EM to this point.

We reiterate our commitment to securing the effective implementation and future operation of the regime to ensure its success for all stakeholders, including the tax profession and taxpayers.

If you have any queries, in the first instance, please contact Donna Bagnall on (02) 9290 5761 or Yasser El-Ansary on (02) 9290 5623.

Yours sincerely

Graham Meyer
Chief Executive Officer
The Institute of Chartered Accountants in Australia