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26 March 2009

Mr Paul McCullough
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Email: taxagentservices@treasury.gov.au

Dear Mr McCullough

Exposure Draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2008

The Taxation Institute of Australia ('Taxation Institute') is pleased to provide its comments in respect of the *Exposure Draft Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2008* ('exposure draft Bill') and Explanatory Material ('exposure draft EM') released for public comment on 12 February 2009.

As indicated in our previous submissions in relation to the passage of the *Tax Agent Services Act 2008*, the Taxation Institute supports the introduction of a regime for a properly regulated tax profession and protection for the consumer. As the exposure draft Bill is an integral part of this regime, we believe it needs to be introduced into the Parliament as a matter of urgency to complete the legislative framework for the administration of the new regulatory regime.

In the interests of having a mature and workable administrative framework, we also recommend that the opportunity is taken to introduce amendments to the *Tax Agent Services Act 2008* in the exposure draft Bill to address a number of our concerns raised with the Senate Economics Committee as part of its inquiry into the Bill preceding the main this Act. A copy of our submission to the Senate Economics Committee is attached.

In the context of our overall support for the proposed regulatory framework, we provide the following comments for your consideration in respect of the exposure draft Bill. In doing so, our submission does not attempt to identify all possible issues but rather focuses on two key areas of concern:

- the proposed safe harbour provisions; and
- the transitional rules for entities that are not currently required to register to provide a taxation or BAS service for a fee.

Schedule 1: Consequential amendments and the safe harbour provisions

As part of a regime providing consumer protection, the Taxation Institute supports in principle the proposed amendments to sections 284-75 and 286-75 of the *Taxation Administration Act 1953* to

provide relief from certain administrative penalties for taxpayers who engage a tax agent or a BAS agent ('safe harbour provisions'). However, as indicated in our previous submissions to Treasury, we believe that these proposed provisions should be amended so that the safe harbour is available:

- regardless of whether the misstatement is reckless or intentional;
- if the relevant statement or document is prepared by the registered agent, regardless of whether made/lodged by the registered agent or the taxpayer; and
- for penalties that could be imposed under subsection 284-75(2) (no reasonably arguable position) and subsection 284-75(3) (failure to lodge documents on time).

It is submitted that the safe harbour provisions should operate so that if taxpayers provide all relevant information, no penalty exposure should arise if the registered agent makes an error, whether a careless error or otherwise. The provisions, as currently drafted, do not give this level of comfort as the safe harbour:

- is not available if the misstatement arises from the registered agent's recklessness or intentional disregard of the law;
- is only available if the statement or document is made/lodged with the ATO by the registered agent. If a taxpayer goes to a registered agent with all relevant information and takes the return/ruling request etc prepared by the registered agent and lodges it directly with the ATO, the safe harbour is not available;
- does not apply to penalties under subsection 284-75(2) (no reasonably arguable position) and subsection 284-75(3) (failure to lodge documents on time); and
- does not apply to omissions that cause a statement to be false or misleading.

Also, there is concern as to how a taxpayer will establish that they have given all relevant taxation information to the registered agent. The proposed safe harbours apply if the taxpayer gives the registered entity "all relevant taxation information". The exposure draft EM states at paragraph 2.19 that this means "all information which they would reasonably expect to be necessary…". It is submitted that the exposure draft Bill should be amended to include the "reasonably expect" criterion.

It appears that a taxpayer may be denied the safe harbour if the registered agent's registration has been terminated and even the tax agent (let alone the taxpayer) is not aware of the Board's decision. For instance, under proposed sub-sections 284-75(1A) and 286-75(1A), a taxpayer must engage a registered tax agent or BAS agent to rely on the safe harbour. However, if the Board has terminated this registration under section 40-20 of the *Tax Agent Services Act 2008,* there could be a period of up to 30 days before the registered agent is made aware of the Board's decision. It is submitted that amendments should be made to preclude this outcome.

Finally, the Taxation Institute is concerned that there is a need to clarify more clearly how the safe harbour provisions will interact with the Code of Professional Conduct in the *Tax Agent Services Act 2008*.

Paragraph 2.16 of the exposure draft EM indicates that the applicability of the safe harbour "does not depend on the Board's decision whether or not to take action against an agent". However, it should be made clear in the EM that it does not automatically follow that a registered agent will be in breach of the Code of Professional Conduct where a taxpayer has been successful in qualifying for safe harbour relief. Currently the examples in the exposure draft EM send mixed messages about whether the Code of Professional Conduct is relevant in the particular circumstances and, if so, whether the registered agent is potentially in breach of one or more of the provisions of the Code.

Schedule 2 – Transitional rules for entities not currently required to register to provide a taxation or BAS service for a fee

The exposure draft Bill facilitates transitional registration for entities that provide certain taxation or BAS services for a fee where they are not required to be registered under the current law. This transitional registration applies to:

- certain tax agent services (other than a BAS service within the meaning of the main Bill) for a fee (Schedule 2, Clause 4);

- BAS services within subsection 251L(7) ITAA 1936 provided by a person referred to in subsection 251L(6) ITAA 1936 (Schedule 2, Clause 5(1)); and

- BAS services (provided by a person) that are not within subsection 251L(7) ITAA but which come within the expanded definition of BAS services in section 90-10 of the *Tax Agent Services Act 2008* (Schedule 2, Clause 5(2)).

If an entity self assesses itself against the eligibility criteria for this transitional registration and notifies the Board within the required timeframe that it satisfies these criteria, the entity is deemed to be a registered tax agent or registered BAS agent for a two year period beginning immediately after commencement of the regime. The Board also has the power to impose conditions on the entity's registration and to require the entity to maintain professional indemnity insurance (Schedule 2, Clauses 4(2) and 5(3)).

The Taxation Institute appreciates the very practical nature of this proposed transitional registration and the need to have it. It brings within the regulatory regime, via a simple notification procedure to the Board, three new classes of registrant directly affected by the regulatory regime and provides a transitional mechanism for easing them into the system.

However, although a person is taken to be a registered tax agent or BAS agent within the meaning of the new law under these transitional provisions, the Taxation Institute is concerned that the legislative framework and associated explanatory material for the administration of the these transitional registrations does not adequately clarify the Board's powers to administer this type of deemed registration or the transitional registrant's rights and obligations.

In respect of an entity providing tax agent services in the above circumstances, paragraph 3.26 of the draft EM indicates that

> [b]ecause the requirement is to notify, not to apply, the Board is not required to consider the notification. (The Board may, however, upon receiving a notification or subsequently, seek additional information from the entity or commence an investigation if it considers it necessary.)

Curiously the above information is not repeated in the exposure draft EM in respect of either of the BAS service situations set out above, but presumably would also apply in those situations.

Even though a person is taken to be a registered tax agent or BAS agent within the meaning of the new law under these particular transitional provisions, it is not clear whether this status of itself allows or requires the Board to exercise the same regulatory powers over these types of registrations as they do over registrations under the *Tax Agent Services Act 2008.*

For instance, whilst the exposure draft Bill imposes no legislative requirement on the Board to consider a notification under these deeming provisions, paragraph 3.26 of the draft exposure EM indicates that the Board has a discretionary investigative power in relation to this notification. It is not clear from the exposure draft EM or the exposure draft Bill on what basis the Board can decide to request further information or instigate an investigation in respect of a notification and whether the applicant has to comply, nor is it clear what action the Board can take against the applicant as a result of this action or investigation. Therefore, the full nature and extent of the Board's powers in respect of these transitional notifications is not clear.

The Taxation Institute is concerned that if someone incorrectly self assesses their entitlement to this transitional registration concession and notifies the Board of their entitlement within the required time, unless the Board decides to request additional information or instigate an investigation, the issue will not be resolved formally until the two year deemed registration period expires and that entity has to reapply under the main provisions of the *Tax Agent Services Act 2008.* We are concerned that consumer protection within this time period could be compromised.

The Taxation Institute recommends that the provisions of the exposure draft Bill and the associated material in the exposure draft EM relating to these transitional registrations are amended to clarify the status of these registrations, in particular the Board's powers to administer and review these registrations and a transitional registrant's rights and obligation.

By way of further clarification, we also note that example 3.5 in the draft exposure EM states that

> Deaken is a bookkeeper and is providing BAS services for a fee to his clients without working under the direction of a tax agent, before the commencement time. Therefore, Deaken is illegally providing BAS services as he is not a registered tax agent and is not a person mentioned in subsection 251(6) of the current law.

The wording of the example is misleading. The implication is that Deaken has to work under the direction of a tax agent to provide BAS services legally under section 251L. This is only partially correct. For example, if Deaken is a member of a recognised professional association, he does not have to work under the direction of a tax agent to provide BAS services legally under section 251L. The example needs to make it clear that working under the direction of a tax agent is only one of the ways in which a person can satisfy subsection 251L(6). We also note an incorrect legislative reference in this example – "subsection 251(6)" should be "subsection 251L(6)").

The Taxation Institute is a happy to make its representatives available to discuss our submission with you. In the meantime, if you would like to discuss any of the issues raised in our submission or require further assistance or information, please contact the Joan Roberts on 03 9611 0178 or the Taxation Institute's Senior Tax Counsel, Dr Michael Dirkis, on 02 8223 0011.

Yours sincerely

Joan Roberts
President

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13th January 2009

Mr John Hawkins
Committee Secretary
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Department of the Senate
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Dear Mr Hawkins

Inquiry into the Tax Agent Services Bill 2008

The Taxation Institute of Australia ('Taxation Institute') is pleased to have been provided with an opportunity to put forward its comments to the Senate Economics Committee in relation to the Committee's inquiry into the *Tax Agent Services Bill 2008* ('*TAS Bill 2008*').

The Taxation Institute supports the introduction of the *TAS Bill 2008* for a properly regulated tax profession and protection for the consumer. Subject to some issues of detail as indicated below, we support the general overhaul of the regulatory framework as set out in the *TAS Bill 2008* and acknowledge it as being a necessary response to the significant changes that have occurred in the way that tax professionals operate within an increasingly complex tax environment.

In the context of our overall support for the proposed regulatory framework, we provide the following comments for the Committee's consideration.

1. Absence of complete legislative package for the Committee's consideration

The Taxation Institute is concerned that the anticipated *Tax Agent Services (Consequential and Transitional Provisions) Bill* ('*TAS(CTP) Bill*') was not introduced into the Parliament at the same time as the *TAS Bill 2008*. Amongst other details, the *TAS(CTP)Bill* should set out the crucial details of the anticipated safe harbours for taxpayers from tax shortfall administrative penalties where they have engaged a registered tax agent or BAS service provider, as well as crucial details about how we are going to transition into the new regime. Neither have we seen the release of the proposed final *Tax Agent Services Regulation* ('TAS Regs'). Both these Bills and the regulations were released in draft as a package for public comment in May 2008.

As the *TAS Bill 2008*, the *TAS(CTP)Bill* and the *TAS Regs* interact to constitute the complete regulatory framework, we are concerned that the Committee is hampered in its capacity to assess effectively the operation of the *TAS Bill 2008* within the workings of the overall proposed regulatory regime.

For the same reasons the Taxation Institute is unable to comment fully and comprehensively on the *TAS Bill 2008* or to assess whether all potential inconsistencies between the proposed legislation and regulations have been satisfactorily resolved.

For example, subsection 20-5(1) of the *TAS Bill 2008* requires as part of the eligibility for registration as a registered tax agent or BAS agent that an individual must meet certain requirements prescribed by the regulations. At present, there is a possibility that the proposed work experience registration eligibility criterion set out in the May 2008 draft regulations (Schedule 2, Part 1, para 104) is rendered inoperative by the definition of a voting member of a Recognised Professional Association in the same draft regulations (Schedule 1, Part 1, para 109). Therefore, without seeing the proposed final regulations, it is difficult to determine whether the registration provisions in subsection 25-5(1) of the *TAS Bill 2008* will operate as intended.

2. Other issues

We also draw the Committee's attention to some issues in the *TAS Bill 2008* that would benefit from further clarification and resolution. This list of issues is not intended to be exhaustive but rather indicative of the types of issues in and associated with the *TAS Bill 2008* that can be resolved to ensure the clear operation of the proposed regulatory regime:

- the need for clarification in the Code of Professional Conduct as to when a tax agent can rely on information provided by a client and when the tax agent needs to seek confirmation of that information (subsection 30-10(9));

- consideration should be given to allowing the Tax Practitioners Board ('Board') to have a discretion to permit a deceased practitioner's registration under the regulatory regime to continue to be conducted under the control of a another registered tax agent pending the sale of the deceased practitioner's business (sections 40-5, 40-10 and 40-15);

- clarity could be provided regarding the use of structures involving partnerships of trusts by ensuring that the notes within *TAS Bill 2008* in relation to the use of trusts confirm that trusts maybe used for partnerships of trusts as well as of individuals or companies; and

- whilst the *TAS Bill 2008* now allows the Board to impose conditions on registration that can result in individuals with extensive experience in a specialised area of taxation law to be eligible for registration provided all of the other registration requirements are satisfied (subsections 20-25(5)-(7)), it would be helpful if the Explanatory Memorandum to the *TAS Bill 2008* could further illustrate the scope of this facility. For instance, paragraph 2.69 indicates that specialist registration might extend to GST. Other examples would assist in clarifying its scope, e.g., its impact on Research and Development specialists.

The Taxation Institute is happy to make its representatives available to appear before the Committee. In the interim, if you would like to discuss any of the issues raised in our submission or require further assistance or information, please contact the Joan Roberts on 03 9611 0178 or the Taxation Institute's Senior Tax Counsel, Dr Michael Dirkis, on 02 8223 0011.

Yours sincerely

Joan Roberts
President