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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TAX AGENT SERVICES (TRANSITIONAL PROVISIONS AND
CONSEQUENTIAL AMENDMENTS) BILL 2009

REVISED EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon Wayne Swan MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY
THE HOUSE OF REPRESENTATIVES
TO THE BILL AS INTRODUCED

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Glossary

The following abbreviations and acronyms are used throughout this revised explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
ATO	Australian Taxation Office
BAS	Business Activity Statement
Board	Tax Practitioners Board
Code	Code of Professional Practice
Commissioner	Commissioner of Taxation
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
Minister	Treasury portfolio Minister
R&D	research and development
state Board	Tax Agents' Board
TAS Act	<i>Tax Agent Services Act 2009</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

General outline and financial impact

Transition to the new regulatory regime for the provision of tax agent services

This Bill facilitates the smooth transition from the current law regarding the registration of tax agents to the new law in the *Tax Agent Services Act 2009* (TAS Act) regarding the regulation and registration of tax agents and Business Activity Statement (BAS) agents.

Date of effect: Most of the provisions in this Bill will commence immediately after the commencement of Part 2 of the TAS Act. Other provisions will either commence on the day on which this Bill receives Royal Assent or at the same time as the commencement of Part 2 of the TAS Act. These dates of effect are outlined in paragraphs 1.53 to 1.58.

Part 2 of the TAS Act commences on a single day to be fixed by Proclamation. A Proclamation must not specify a day that occurs before the day on which this Bill receives Royal Assent.

Proposal announced: These proposals were announced by the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs in Media Release No. 039 of 29 May 2008.

Reform of the existing regulation of tax agents was first announced in 1998.

Financial impact: There is expected to be a cost to the revenue associated with the introduction of ‘safe harbour’ provisions which exempt taxpayers from administrative penalties in certain circumstances when they use a tax agent or BAS agent. However, this cost is unquantifiable.

Compliance cost impact: The compliance costs associated with the transition to the new regime, noted in the explanatory memorandum to the Tax Agent Services Bill 2008, are estimated to be:

- small for tax agents and BAS agents with the appropriate qualifications for registration purposes; and
- potentially large for those individuals seeking registration as a BAS agent who do not currently meet the minimum standard of educational qualifications.

Summary of regulation impact statement

Regulation impact on business

A summary of the regulation impact statement associated with the introduction of the new regulatory regime was provided in the explanatory memorandum to the Tax Agent Services Bill 2008.

Chapter 1

Consequential and other amendments

Outline of chapter

1.1 Items 1 to 22 and item 25 of Schedule 1 to this Bill provide for the amendments to existing legislation that are necessary as a result of the commencement of the *Tax Agent Services Act 2009* (TAS Act).

1.2 Items 27 to 30 of Schedule 1 to this Bill provide for amendments to the TAS Act.

Context of amendments

1.3 The new framework for the registration of tax agents is contained in the TAS Act, which replaces Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936) (the current law).

1.4 As a consequence of the repeal of the current law, certain references in existing Acts, such as references to the current law and references to, and definitions of, ‘tax agent’, require amendment.

1.5 Other amendments are made to existing Acts to reflect changes associated with the transfer of the general administration of the provisions relating to the registration of tax agents from the Commissioner of Taxation (Commissioner) to the Tax Practitioners Board (Board).

1.6 Minor amendments are also made to the TAS Act to correctly reference provisions in this Bill and correct minor typographical errors.

Summary of new law

1.7 This Bill:

- repeals provisions in the law that will no longer have any effect due to the commencement of the TAS Act (such as Part VIIA of the ITAA 1936 regarding the registration of tax agents);

- amends, repeals or inserts relevant definitions and references in other Acts to ensure consistency with the TAS Act;
- amends certain provisions in the *Taxation Administration Act 1953* (TAA 1953) to reflect the enhanced independence of the Board from the Commissioner as provided for in the TAS Act;
- expands the definition of ‘taxation law’ to include the TAS Act, and associated regulations; and
- amends the TAS Act to correct typographical errors and to expand the circumstances in which the Board can disclose information to the Commissioner.

Detailed explanation of new law

Amendment to the *A New Tax System (Goods and Services Tax) Act 1999*

1.8 The Bill repeals the definition of ‘registered tax agent’ in section 195-1 which is ‘as defined in Part VIIA of the *ITAA 1936*’, because Part VIIA will also be repealed by the Bill. The term ‘registered tax agent’ is not used in the *A New Tax System (Goods and Services Tax) Act 1999*, and therefore no replacement definition is required. [*Schedule 1, item 1, section 195-1 of the A New Tax System (Goods and Services Tax) Act 1999*]

Amendment to the *Corporations Act 2001*

1.9 The Bill replaces a reference in paragraph 766B(5)(c) to ‘tax agent registered under Part VIIA of the *Income Tax Assessment Act 1936*’ with a reference to ‘registered tax agent or Business Activity Statement (BAS) agent (within the meaning of the *Tax Agent Services Act 2009*)’. The amendment updates the reference and maintains the same effect of the paragraph. [*Schedule 1, item 2, paragraph 766B(5)(c) of the Corporations Act 2001*]

Amendments to the *Fringe Benefits Tax Assessment Act 1986*

1.10 The Bill repeals Part IX of the *Fringe Benefits Tax Assessment Act 1986*. Part IX provides for administrative penalties for:

- unregistered entities advertising to prepare fringe benefits tax returns; and

- tax agents that allow unregistered entities to prepare fringe benefits tax returns or conduct any business relating to fringe benefits tax returns on the tax agent's behalf.

1.11 This Part will become redundant upon commencement of the new regulatory regime as administrative penalties which cover services related to fringe benefits tax returns are contained in the TAS Act. *[Schedule 1, item 3, Part IX of the Fringe Benefits Tax Assessment Act 1986]*

1.12 The Bill repeals the definition of 'registered tax agent' in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*, which is 'as defined in Part VIIA of the *Income Tax Assessment Act 1936*', and replaces it with a new definition of 'registered tax agent', which states that 'registered tax agent has the meaning given by subsection 90-1(1) of the *Tax Agent Services Act 2009*'. These amendments update the reference and maintain the same effect of the definition. *[Schedule 1, item 4, subsection 136(1) of the Fringe Benefits Tax Assessment Act 1986]*

Amendments to the *Income Tax Assessment Act 1936*

1.13 The Bill repeals the definition of 'registered tax agent' in subsection 6(1), which 'has the meaning given by section 251A' of the ITAA 1936. Section 251A is in Part VIIA of the ITAA 1936 and is repealed by the Bill. With the repeal of Part VIIA, all occurrences of the term 'registered tax agent' in the ITAA 1936 are repealed. Therefore no replacement definition is required. *[Schedule 1, item 5, subsection 6(1) of the ITAA 1936]*

1.14 The Bill amends paragraph 16(4)(b) of the ITAA 1936 to allow the Commissioner, or other person authorised by the Commissioner, to communicate information to a board, or a member of a board, for the purpose of the board performing its functions or exercising its powers under a taxation law. *[Schedule 1, item 6, paragraph 16(4)(b) of the ITAA 1936]*

1.15 This amendment maintains the existing ability of the Commissioner to disclose information to the state-based Tax Agents' Boards (state Boards). The amendment is necessary because, unlike the current state Boards, the Board will not be a board exercising a function under an Act administered by the Commissioner (but will be a Board exercising a function under a taxation law, see paragraph 1.22).

1.16 This provision will allow, for instance, the Commissioner to disclose information about unregistered entities, which may assist the Board in its new role of monitoring and taking action against entities providing tax agent services for a fee without registration. This is a function that is currently performed by the Australian Taxation Office (ATO).

1.17 The Bill repeals Part VIIA of the ITAA 1936. Part VIIA contains the current law concerning the registration of tax agents and is being replaced by the new framework contained in the TAS Act. *[Schedule 1, item 7, Part VIIA of the ITAA 1936]*

Amendments to the *Income Tax Assessment Act 1997*

1.18 The Bill repeals section 214-185 of the *Income Tax Assessment Act 1997* (ITAA 1997). The effect of section 214-185 is that persons giving a franking credit return or making an objection for the purposes of Part 3-6 (dealing with the imputation system) of the ITAA 1997 are subject to the tax agent registration requirements in the current law. This section is no longer needed as those persons will be covered by the TAS Act, given that the definition of ‘tax agent service’ in the TAS Act includes ascertaining or advising on liabilities, obligations or entitlements under a taxation law. (The current law applies to income tax-related services.) *[Schedule 1, item 8, section 214-185 of the ITAA 1997]*

1.19 The Bill replaces a reference to a ‘registered tax agent’ in the definition of ‘recognised tax adviser’ in subsection 995-1(1) with a reference to a ‘registered tax agent or BAS agent’, reflecting the broadening of the regulatory regime to include the regulation of entities providing BAS services for a fee or other reward as BAS agents. *[Schedule 1, item 9, definition of ‘recognised tax adviser’ in subsection 995-1(1) of the ITAA 1997]*

1.20 Consistent with this amendment, the Bill inserts a new definition of ‘registered tax agent or BAS agent’ which links to the definition in the TAS Act. *[Schedule 1, item 11, subsection 995-1(1) of the ITAA 1997]*

1.21 The Bill also replaces the existing definition of ‘registered tax agent’ to link into the new definition provided for in subsection 90-1(1) of the TAS Act. *[Schedule 1, item 10, definition of ‘registered tax agent’ in subsection 995-1(1) of the ITAA 1997]*

1.22 ‘Taxation law’ is defined in subsection 995-1(1) of the ITAA 1997 to mean an Act of which the Commissioner has the general administration, or regulations made under such an Act. The Bill expands the definition of ‘taxation law’ to include the TAS Act and regulations made under the TAS Act, despite the fact that the Board and not the Commissioner will have general administration of the TAS Act. This ensures that the Board can rely on certain provisions in the taxation law, such as those relating to the prosecution of offences contained in Part III of the TAA 1953. *[Schedule 1, item 12, at the end of the definition of ‘taxation law’ in subsection 995-1(1) of the ITAA 1997]*

Amendment to the *Income Tax (Transitional Provisions) Act 1997*

1.23 The Bill repeals section 214-130 of the *Income Tax (Transitional Provisions) Act 1997*, a provision that ensures that the current law regarding the registration of tax agents operates in relation to the imputation system. As noted in paragraph 1.18, this provision will no longer be required as persons providing services in relation to the imputation system will be covered by the TAS Act. [Schedule 1, item 13, section 214-130 of the *Income Tax (Transitional Provisions) Act 1997*]

Amendments to the *Taxation Administration Act 1953*

1.24 A number of amendments are made to the TAA 1953 to ensure that references are appropriately updated to account for new definitions introduced by the TAS Act and to ensure that relevant ‘machinery provisions’ in the TAA 1953 are effectively applied to the TAS Act and the Board.

Amendment to terms

1.25 The Bill replaces references to a ‘registered tax agent’ in paragraph 8AAZLH(2A)(b) and in subsection 8J(2A) with references to a ‘registered tax agent or BAS agent’, reflecting the broadening of the regulatory regime to include the regulation of entities providing BAS services for a fee or other reward as BAS agents. [Schedule 1, item 17, paragraph 8AAZLH(2A)(b) of the TAA 1953 and item 19, subsection 8J(2A) of the TAA 1953]

1.26 The Bill inserts a new definition of the term ‘registered tax agent or BAS agent’ in subsection 2(1) of the TAA 1953, which states that ‘registered tax agent or BAS agent has the same meaning as in the *Tax Agent Services Act 2009*’. This definition is required because of the amendments to paragraph 8AAZLH(2A)(b) and subsection 8J(2A) as noted above. [Schedule 1, item 14, subsection 2(1) of the TAA 1953]

Applying machinery provision in the TAA 1953 to the TAS Act

1.27 The TAS Act already applies sections 3D and 3E of the TAA 1953 as if references to the Commissioner were references to the Board. This effectively gives the Board the authority to disclose information, protected under the TAS Act, to certain law enforcement agencies and Royal Commissions (see section 70-45 of the TAS Act).

1.28 In addition to applying sections 3D and 3E, this Bill makes amendments to the TAA 1953 to ensure that other machinery provisions apply to the Board and the TAS Act.

1.29 Part III contains prosecution and offence provisions. The Bill amends Part III to apply that Part in relation to the TAS Act as if references (with certain exceptions) to the Commissioner, or an office of the Commissioner, were references to the Board. [*Schedule 1, item 18, section 8AC of the TAA 1953*]

1.30 The amendment allows the Board to initiate criminal proceedings for offences against certain provisions in Part III of the TAA 1953 that relate to the TAS Act, rather than requiring it to rely on the Commissioner to commence such proceedings.

1.31 Not all references to the Commissioner will be deemed to be references to the Board. The exceptions are those provisions that:

- provide for an offence for failing to lodge an instrument with the Commissioner for assessment (paragraph 8C(1)(b)); or
- relate to the payment of money to the Commissioner (sections 8HA, 8W, 8WC, 8ZE, 8ZG and 8ZH).

1.32 These provisions are excepted because the Board's functions do not include receipt of instruments concerning assessment and the Board does not have the power to receive money on behalf of the Commonwealth. It is therefore appropriate for references to the Commissioner (or an office of the Commissioner) to be retained in relation to the TAS Act in these circumstances.

1.33 References to the Commissioner in sections 8AB and 8AC which provide for the application of Part III to the *Development Allowance Authority Act 1992* and the TAS Act, respectively, will also remain unchanged.

1.34 By ensuring that it is the Board and not the Commissioner that can undertake prosecution action with respect to offences committed in the context of the new regulatory regime, the Board's independence from the Commissioner is enhanced.

Example 1.1

The Board has requested that Allan appear before it in relation to an investigation that the Board is conducting.

At the investigation hearing, Allan refuses to answer a question posed by the Board and is therefore guilty of an offence under section 8D of the TAA 1953 for failing to answer questions when attending before the Board.

Rather than relying on the Commissioner to initiate criminal proceedings under section 8D of the TAA 1953, the Board has the power to initiate criminal proceedings against Allan in relation to the offence committed.

1.35 Another ‘machinery’ provision being applied to the Board is section 15 of the TAA 1953. This provision specifies certain persons that are able to represent the Commissioner or an office of the Commissioner in any action, prosecution or other proceeding under, or arising out of, a taxation law and which is instituted by or on behalf of the Commissioner or an office of the Commissioner.

1.36 The Bill amends section 15 to apply that section in relation to the TAS Act as if references to the Commissioner, or an office of the Commissioner, were references to the Board, and as if references to a Second Commissioner or to a Deputy Commissioner were omitted. *[Schedule 1, item 20, subsection 15(3) of the TAA 1953]*

1.37 The Board will therefore be able to be represented by certain persons in any action, prosecution or other proceeding under, or arising out of, a taxation law that relates to the TAS Act. This will enable the efficient use of the Board’s resources.

1.38 The persons that may represent the Board are:

- a person enrolled as a barrister, solicitor, barrister and solicitor or legal practitioner of a federal court or of the Supreme Court of a State or Territory; and/or
- a person authorised by the Board, by instrument in writing, to appear.

1.39 Section 15A of the TAA 1953 will also be applied to the Board. This provides that the Commissioner may certify a copy or extract of a document obtained pursuant to a taxation law to be a true copy or true extract. *[Schedule 1, item 21, subsection 15A(12) of the TAA 1953]*

1.40 This amendment will allow the Chair of the Board to certify a copy or extract of a document to be a true copy or extract, when the document is obtained by the Board pursuant to a taxation law that relates to the TAS Act (for example, pursuant to section 8D of the TAA 1953). It would be inappropriate to require the Board to seek the Commissioner’s certification of documents obtained pursuant to a taxation law that relates to the TAS Act, particularly given the Board has the general administration of that Act.

1.41 Under paragraph 20-20(2)(a) of the TAS Act the Board may require an application for registration under section 20-20 of the TAS Act to be accompanied by any documents. The amendments ensure that the Board can certify a copy or extract of the document provided by virtue of paragraph 20-20(2)(a), as the documents will be obtained by the Board pursuant to a taxation law (the TAS Act is now included in the definition of 'taxation law', see paragraph 1.22 above).

1.42 As a consequence of applying machinery provisions in the TAA 1953 to the Board, further amendments of the TAA 1953 need to be made.

1.43 Section 3B of the TAA 1953 provides that the Commissioner is required to publish in his annual report information regarding certain actions taken under provisions in the TAA 1953 (such as disclosing information to law enforcement agencies under section 3D and 3E). The Bill ensures that, to the extent that action is taken by the Board under any of the provisions, the Commissioner does not have to include such action in his own annual report. *[Schedule 1, item 15, subsection 3B(1C) of the TAA 1953]*

1.44 Reporting on the working of these provisions insofar as they apply in relation to the TAS Act (and are undertaken by the Board) will be included in an annual report required to be prepared by the Board under the TAS Act (see section 60-130 of the TAS Act).

1.45 Another amendment is made to section 3C of the TAA 1953. This provision governs the use and disclosure of taxpayer information obtained under or for the purposes of the TAA 1953. The Bill amends section 3C to ensure that these secrecy provisions do not apply to the Board to the extent that it receives or discloses information under a provision of the TAA 1953 that has been applied to the Board. Instead, the use and disclosure of such information will be governed by the secrecy provisions in the TAS Act (see section 70-35 of the TAS Act). *[Schedule 1, item 16, subsection 3C(1AB) of the TAA 1953]*

1.46 Further amendments to the TAA 1953 are made to ensure that the appropriate machinery provisions in the TAA 1953 apply to the civil penalty regime created by the TAS Act. As civil penalties are imposed by a court it is appropriate to treat them differently to other liabilities (such as ordinary taxation liabilities) that arise under a taxation law. This is consistent with the manner in which civil penalties imposed under the promoter penalty regime (see Division 290 of Schedule 1 to the TAA 1953) are treated.

1.47 To achieve this result, civil penalties that arise under the TAS Act are specifically excluded from the definition of ‘tax-related liability’ provided for in subsection 255-1(1). Similarly, the civil penalty machinery provisions contained in Subdivision 298-B are specifically applied to civil penalties that arise under the TAS Act. *[Schedule 1, item 22, subsection 255-1(2) of Schedule 1 to the TAA 1953 and item 25, section 298-80 of Schedule 1 to the TAA 1953]*

Amendments to the *Tax Agent Services Act 2009*

1.48 The Bill amends paragraph 20-5(4)(a) of the TAS Act to ensure that the provision refers to item 7 of Schedule 1 to the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009*, rather than item 12 of Schedule 1 to the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009*. This reflects a change in numbering in this Bill. *[Schedule 1, item 27, paragraph 20-5(4)(a) of the TAS Act]*

1.49 The Bill also amends subparagraphs 50-30(1)(c)(iii) and (2)(c)(iii) of the TAS Act to replace the words ‘or control’ with ‘and control’, to ensure consistency with the wording in the subparagraphs. The amendment is needed to amend the typographical error. *[Schedule 1, item 28, subparagraphs 50-30(1)(c)(iii) and (2)(c)(iii) of the TAS Act]*

1.50 The Bill also amends section 70-40 of the TAS Act which outlines the circumstances in which the Board is able to disclose information to the Commissioner (in addition to those circumstances covered by subsection 70-35(2)). The amendments remove the requirement that the Board be ‘satisfied’ that the information is relevant to a particular purpose. A reference to the Board’s satisfaction is not required as the onus is on the Board, prior to disclosure, to ensure that the proposed disclosure does fall within the exemption in section 70-40. *[Schedule 1, item 29, subsection 70-40(1) of the TAS Act]*

1.51 Section 70-40 is further amended to allow the Board to disclose information to the Commissioner for the purposes of a civil penalty provision in the taxation law. This would ensure, for instance, that the Board can provide evidence of a tax agent’s involvement in the promotion of tax schemes (the promoter penalty regime creates a civil penalty — see Division 290 of Schedule 1 to the TAA 1953). *[Schedule 1, item 30, subsection 70-40(2) of the TAS Act]*

1.52 This expanded disclosure is not intended to limit the Board’s ability to disclose information to the Commissioner for the purposes of a civil penalty created under the TAS Act. Such disclosures, if required, would fall within subsection 70-35(2) of the TAS Act.

Commencement

1.53 Sections 1 to 3 of the Bill commence on the day on which this Bill receives Royal Assent. These sections include the short title of the Bill, the commencement provisions and provisions relating to the Schedules. *[Section 2]*

1.54 Schedules 1, Part 1 and Schedule 2 to the Bill commence immediately after the commencement of Part 2 of the TAS Act. *[Section 2]*

1.55 Schedule 1, Part 1 provides for the consequential amendments to be made following the commencement of the TAS Act and Schedule 2 contains the provisions to allow a smooth transition from the existing law requiring the registration of tax agents in the current law to the new regulatory regime for the provision of tax agent services contained in the TAS Act.

1.56 As outlined in the TAS Act, Part 2 of that Act will commence on a single day to be set by Proclamation. However, Proclamation must occur within nine months of this Bill receiving Royal Assent.

1.57 This ensures that the key regulatory provisions in the TAS Act (including Part 2 of the TAS Act) and the provisions contained in Schedules 1, Part 1 and Schedule 2 to this Bill will commence at the same time.

1.58 The commencement of Schedule 1, Part 1 and Schedule 2 to the Bill is referred to as 'commencement' throughout this explanatory memorandum.

Chapter 2

Relief from certain administrative penalties for taxpayers who engage a registered tax agent or BAS agent

Outline of chapter

2.1 Items 23 and 24 of Schedule 1 to this Bill amend the *Taxation Administration Act 1953* (TAA 1953) to provide for ‘safe harbours’ for taxpayers who engage a tax agent or a Business Activity Statement (BAS) agent. The safe harbours ensure that, in certain circumstances, taxpayers who engage a tax agent or a BAS agent are not liable to administrative penalties that ordinarily apply for making a false or misleading statement resulting in a shortfall amount, or for late lodgment.

2.2 Item 26 of Schedule 1 to this Bill sets out when the safe harbour provisions apply.

Context of amendments

Operation of current provisions

Penalty for false or misleading statement

2.3 Subsection 284-75(1) of Schedule 1 to the TAA 1953 provides that a taxpayer is liable to an administrative penalty if they, or their agent, make a statement to the Commissioner of Taxation (Commissioner) that is false or misleading in a material particular, and this results in a shortfall amount.

2.4 A shortfall amount is the difference between the amount of tax, credit or payment entitlement calculated based on a taxpayer’s statement and the amount calculated in accordance with the law. A shortfall amount arises where the tax liability is less, or the credit or payment entitlement is more, than it would have been if the statement had not been false or misleading.

2.5 The amount of the administrative penalty is calculated by determining the base penalty amount (see section 284-90) adjusted

upwards for aggravating factors (see section 284-220) or downwards (see section 284-225) for mitigating factors.

2.6 The base penalty amount for providing a false or misleading statement is calculated as a percentage of the shortfall amount, with the percentage being determined with reference to the culpability of the taxpayer or their agent. Therefore, the base penalty will depend on whether the shortfall resulted from:

- intentional disregard of a taxation law (this gives a penalty of 75 per cent of the shortfall amount);
- recklessness as to the operation of a taxation law (this gives a penalty of 50 per cent of the base penalty amount); or
- a failure to take reasonable care to comply with a taxation law (this gives a penalty of 25 per cent of the base penalty amount).

2.7 This last point highlights the fact that, at present, a taxpayer will be subject to a penalty if the making of the false or misleading statement resulted from not only their own carelessness (that is, their failure to take reasonable care) but also the carelessness of their agent.

Penalty for failure to lodge on time

2.8 Subsection 286-75(1) of Schedule 1 to the TAA 1953 provides that a taxpayer is liable to an administrative penalty if they fail to give the Commissioner a return, notice, statement or other document on time and in an approved form.

2.9 The amount of the penalty is determined by reference to a base penalty amount and adjusted on the basis of the size of the taxpayer (see section 286-80). The 'base penalty' is calculated as one penalty unit for each period of 28 days, or part thereof, starting on the day the document is due and ending when the document is given to the Commissioner.

2.10 The base penalty amount is multiplied by two or five depending on the size of the entity (measured by the entity's withholding status, the entity's assessable income or the entity's annual turnover) at the time lodgment is required.

2.11 The culpability of the taxpayer or their agent is not taken into account in determining the taxpayer's liability to the penalty, nor the amount of the penalty. As a consequence, a taxpayer will be liable to a penalty where the failure to lodge a document in the approved form on

time resulted from their tax agent's carelessness (or indeed, even where reasonable care was taken).

Rationale for changes

Why should there be an exemption from certain administrative penalties?

2.12 With the introduction of self assessment, the burden of applying the taxation laws to individual circumstances was shifted in some respects from the Commissioner to taxpayers. While it remains appropriate, even in a self-assessing environment, for taxpayers to be responsible for deliberate or reckless acts (whether their own or their agent's), this Bill recognises that in the absence of recklessness or intentional disregard for requirements in the taxation law a taxpayer should not be subject to an administrative penalty as a result of the actions (or omissions) of their agent.

2.13 This approach is possible now that the new regulatory framework allows effective action to be taken to improve the performance of tax agents or BAS agents where necessary.

Where an exemption for certain administrative penalties will not apply

2.14 Taxpayers are not relieved from administrative penalties for their own or their registered tax agent's or BAS agent's recklessness or intentional disregard of the taxation law (for example, where the failure to lodge a document or the provision of a false or misleading statement occurs in the context of a scheme — Subdivision 284-C of Schedule 1 to the TAA 1953 provides for penalties relating to schemes).

2.15 Where the taxpayer becomes liable for an administrative penalty due to the recklessness or intentional disregard of the taxation law by their registered tax agent or BAS agent (and through no fault of their own) it is open to the Commissioner to remit all or part of the penalty (see section 298-20 of Schedule 1 to the TAA 1953).

2.16 The Bill does not provide a safe harbour for subsection 284-75(3) of Schedule 1 to the TAA 1953, which relates to the raising of a debt where the taxpayer fails to lodge as required. Although superficially subsection 284-75(3) appears similar to 284-75(1) for failure to lodge on time, for which the Bill provides a safe harbour, they differ significantly. Subsection 284-75(3) requires the Commissioner to make a determination of an amount, that is, he will generally undertake an audit before the penalty can be applied. Usually lodgment is required before the audit commences, unless there is a perceived risk to the revenue such as fraud, evasion or flight. It is considered that failure to

lodge after being requested to lodge and being advised of an audit, is to be reckless or intentionally disregarding the law. Therefore a safe harbour would generally never apply to administrative penalties under subsection 284-75(3).

Summary of new law

2.17 The Bill ensures that taxpayers who engage a registered tax agent or BAS agent and provide them with all relevant information:

- are no longer subject to a penalty for making a false or misleading statement that results in a shortfall amount if the shortfall amount was caused by their agent’s failure to take reasonable care; and
- are no longer subject to a penalty for the failure to lodge a document (under subsection 286-75(1)) where that failure resulted from their agent’s failure to take reasonable care or indeed even when that failure arose despite the agent’s exercise of reasonable care.

2.18 The proposed ‘safe harbours’ exempt taxpayers from administrative penalties in certain circumstances. This liability *is not* transferred to the registered tax agent or BAS agent.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
By engaging a registered tax agent or BAS agent and providing them with all relevant taxation information, taxpayers are not liable for an administrative penalty for making a false or misleading statement to the Commissioner that results from their registered tax agent or BAS agent failing to take reasonable care.	Taxpayers are liable for an administrative penalty for making a false or misleading statement to the Commissioner resulting from their own or their tax agent’s lack of reasonable care.
By engaging a registered tax agent or BAS agent and providing them with all relevant information to enable the preparation and lodgment of a document with the Commissioner on time, taxpayers are not liable for an administrative penalty for late lodgment resulting from their agent’s failure to take reasonable care (or despite their agent exercising reasonable care).	Taxpayers are liable for an administrative penalty for their own and their tax agent’s failure to lodge a document with the Commissioner in the approved form and by a particular day.

Detailed explanation of new law

2.19 Detailed information and specific examples on each of the safe harbours is provided below. However, one general requirement for both safe harbours is that, to access them, a taxpayer must show that they provided all relevant taxation information to their tax agent or BAS agent.

2.20 Using the services of a tax agent or a BAS agent does not of itself mean that an entity discharges their obligations. It remains the entity's responsibility to properly record matters relating to their tax affairs and to bring all of the relevant facts to the attention of the agent in order to show reasonable care. By supplying all relevant taxation information the taxpayer is taking reasonable care. To this end, the taxpayer must:

- bring to the agent's attention all accurate information which they would reasonably expect to be necessary to enable the provision of the tax agent service or BAS service correctly; and
- provide accurate and complete information in response to questions asked by their agent.

2.21 The taxpayer has the burden of proof on them to establish that they provided all relevant information as required. Further guidance and examples on how a taxpayer would discharge this onus of proof are provided below.

Safe harbour from an administrative penalty for making a false or misleading statement

2.22 Taxpayers are not liable to an administrative penalty for the making of a false or misleading statement to the Commissioner resulting in a shortfall amount where:

- the shortfall amount did not result from their tax agent's or BAS agent's recklessness as to the operation of a taxation law or their intentional disregard of a taxation law;
- they can establish that they have provided their agent with all relevant taxation information; and
- the statement was made by their agent.

[Schedule 1, item 23, subsections 284-75(1A) and (1B) of Schedule 1 to the TAA 1953]

Example 2.1

George, a self-funded retiree, had interest-bearing accounts with several different financial institutions. George kept all statements received from these financial institutions and provided these to Alex, a registered tax agent, who prepared and lodged his tax return.

When preparing George's tax return, Alex had relied entirely upon the statements provided by George. However, in calculating the interest income, Alex accidentally omitted a quarterly interest payment from one of the financial institutions.

After an audit was conducted on George's income tax return, it was found that George had a shortfall amount. However, as George had provided Alex with all the relevant information he will not be liable for a shortfall penalty due to Alex's failure to take reasonable care. (Alex may, however, have breached the Code of Professional Conduct (Code) — refer to Chapter 3 of the explanatory memorandum to the Tax Agent Services Bill 2008.)

Example 2.2

Stephen engages Maria, a registered BAS agent, to prepare his quarterly BAS. He provides Maria with details of income and expenditure for the quarter. Stephen confirms that he has provided all the relevant information that Maria requested and any other information that he could think of. Maria then prepares the BAS based on the information provided by Stephen. The BAS is signed by both parties and lodged with the Australian Taxation Office (ATO).

An audit reveals that cash receipts totalling \$10,000 have been omitted from the BAS resulting in a shortfall amount. Stephen went through the information that he provided to Maria and discovered he had forgotten to give the cash receipts to Maria. Because Stephen has not provided all relevant information to Maria, he is therefore liable for an administrative penalty for failing to take reasonable care when making a false or misleading statement resulting in a shortfall amount.

2.23 The safe harbour from administrative penalty in relation to the making of a false or misleading statement will apply to statements that are given on or after the commencement. [*Schedule 1, subitem 26(1)*]

Safe harbour from an administrative penalty for late lodgment of documents in the approved form

2.24 Taxpayers are not liable to an administrative penalty for the late lodgment of a return, notice, statement or other document in the approved form if:

- they can establish that they provided their agent with all relevant taxation information to enable the agent to give the return, notice, statement or other document to the Commissioner by the due date for lodgment; and
- they can establish that the failure to lodge the document in the approved form in time resulted from their tax agent's or BAS agent's failure to take reasonable care (or despite their agent exercising reasonable care).

[Schedule 1, item 24, subsections 286-75(1A) and (1B) of Schedule 1 to the TAA 1953]

Example 2.3

Darney engages Rumi, a registered tax agent, to prepare her income tax return. Rumi asks for Darney's records to be provided by 15 November, and Darney provides her records by that day. Rumi prepares the return and posts it to Darney for signing. Darney signs the return and posts it back to Rumi within two days. Through an oversight in Rumi's office, the return is lodged late.

Darney did all things required in time to enable Rumi to lodge her return in the approved form by the due date. Because of this, and because the reason for late lodgment was a lack of reasonable care by the agent (in this case, an administrative oversight acknowledged by Rumi), Darney is not liable to any penalty.

2.25 Supplying all relevant information to enable the agent to lodge the document on time in an approved form includes meeting deadlines specified by the agent for the provision of relevant taxation information. 'Relevant information' also includes a signed document (where applicable).

Example 2.4

Odilia engages Dylan, a registered tax agent, to prepare her income tax return. Dylan asks Odilia to provide her records by 15 November, and Odilia does so. Dylan prepares the return and posts it to Odilia to sign and return it within the following week. Odilia forgets to return her signed tax return until Dylan's office contacts her the day before the due date for lodgment. She returns the documents immediately, but the return was lodged after the due date.

Because Odilia has not provided all the information (including her signed declaration) to enable Dylan to lodge the return in time, the safe harbour would not relieve Odilia of an administrative penalty for failing to lodge her return on time.

If, however, Odilia has returned her signed tax return within the time frame specified by Dylan, and if her return was subsequently lodged late due to Dylan's lack of reasonable care, Odilia would be able to seek an exemption from the administrative penalty.

Example 2.5

Ruhan, a registered tax agent, has prepared Peter's return in time for it to be lodged by the due date. In the process Ruhan has provided an opinion about the treatment of certain assets relevant to the preparation of Peter's income tax return with which Peter does not agree. Peter seeks a second opinion before agreeing to sign the return. Although Ruhan sought an extension to the due date for lodgment on Peter's behalf, Peter's enquiries still result in the return being lodged late.

The exemption will not apply in this case as the late lodgment of Peter's return is due to his own actions.

2.26 Although the concepts of reasonable care, recklessness and intentional disregard do not exist in relation to penalties for failing to lodge required documents on time the safe harbour is available only where the late lodgment results from the registered tax agent or BAS agent failing to take reasonable care (or occurs despite their exercise of reasonable care). It is not available where the agent intentionally disregards a taxation law or is reckless as to the requirements of a taxation law.

Example 2.6

Lucas, a registered tax agent, has prepared Sofia's return in time for it to be lodged by the due date. However, the time taken to resolve a dispute between Lucas and Sofia regarding the return preparation fees has led to the return being lodged late.

In this case, Lucas's actions in withholding lodgment pending settlement of the dispute regarding fees constitutes intentional disregard of the lodgment obligation. Since the late lodgment is not due to Lucas's failure to take reasonable care, the safe harbour from penalty is not available to Sofia. Note, however, that Sofia could apply for remission of the penalty and Lucas may have breached the Code.

Example 2.7

Courtney engages Davinford GST Specialists, a registered BAS agent, to prepare her BAS. Courtney provides all of her records two weeks before the due date for lodgment, as agreed with Davinford GST Specialists. Davinford GST Specialists has a large number of clients and experiences significant work pressures leading into key lodgment dates and is also in the process of moving its offices into larger premises. It does not post the prepared return to Courtney for signing until after the due date.

Courtney seeks safe harbour from administrative penalty for failing to lodge her return on time. Although the late lodgment was caused by Davinford GST Specialists, knowingly accepting too many clients and taking on an unmanageable workload, or adopting poor practice management practices demonstrates their recklessness as to the operation and requirements of the taxation law. The late lodgment did not result from the agent's failure to take reasonable care, nor in spite of an exercise of reasonable care.

Courtney does not gain the safe harbour from administrative penalty for failing to lodge her return on time.

2.27 If there is a dispute about whether or not the taxpayer provided all relevant information in time for the document to be lodged on time, the taxpayer will need to provide sufficient evidence to satisfy the elements of the safe harbour to the Commissioner in order to obtain the safe harbour.

Example 2.8

Henry is a small business owner. He engages a registered tax agent, Hann Pty Ltd, to handle all tax related matters of his business (including the preparation and lodgment of quarterly BASs and his annual income tax returns). Hann Pty Ltd has many clients and is therefore very busy, so it requests that Henry provides his business transaction records and any other required information on a quarterly basis within a week of each quarter's end. Henry complies with this request.

Henry receives a notice from the Commissioner imposing an administrative penalty for late lodgment of the final quarter's BAS as well as the annual income tax return for the previous year.

Henry writes to the Commissioner outlining his circumstances and seeking withdrawal of the penalty imposed. The Commissioner responds that, in order to obtain the safe harbour, Henry needs to demonstrate that the late lodgment was due to Hann Pty Ltd's failure to take reasonable care.

Henry approaches Hann Pty Ltd. Hann Pty Ltd admits that the paperwork relating to documents to be lodged for Henry at the end of the financial year was accidentally filed without being processed, and was only discovered after the due date for lodgment of the documents had passed. Hann Pty Ltd writes a statement to this effect for Henry to give to the Commissioner.

In this case, because the late lodgment was caused by Hann Pty Ltd failing to take reasonable care, and because Hann Pty Ltd admitted fault, the administrative penalty imposed on Henry for his failure to lodge documents on time may be withdrawn.

If, however, Hann Pty Ltd disputed Henry's assertion that he provided all relevant information on time and refused to admit that it had failed to take reasonable care in lodging the BAS and return, the safe harbour may not be granted. In these circumstances, Henry must provide other evidence to the Commissioner to prove that he provided all relevant taxation information in accordance with the timetable agreed with Hann Pty Ltd, for example, copies of relevant email correspondence with Hann Pty Ltd.

2.28 The safe harbour from administrative penalty for late lodgment of a document in the approved form due to the registered tax agent or BAS agent failing to take reasonable care (or in spite of them exercising reasonable care) applies in relation to a return, notice, statement or other document required to be given on or after the commencement. [*Schedule 1, subitem 26(2)*]

Administration of the 'safe harbour' provisions

2.29 The safe harbour provisions allow the ATO to consider and/or apply the exemption from administrative penalty either prior to or after the imposition of the administrative penalty. This enables the safe harbour to be administered in the most efficient way.

2.30 In situations where a shortfall amount arises due to a tax agent's or BAS agent's failure to take reasonable care, recklessness or intentional disregard for the taxation law, the agent may be referred by the Commissioner or the taxpayer to the Tax Practitioners Board (Board) for appropriate action. However, whether the exemptions from administrative penalties are applied or not, is independent of the Board's decision whether or not to take action against an agent. Similarly, it does not necessarily follow that a registered agent whose client is granted relief from an administrative penalty will necessarily have breached the Code.

2.31 The introduction of these exemptions from administrative penalties does not affect taxpayers' ability to seek remission of any penalties from the Commissioner.

Chapter 3

Transitional arrangements for registration

Outline of chapter

- 3.1 Part 1 of Schedule 2 to this Bill provides for the meanings of defined terms used in Schedule 2.
- 3.2 Part 2 of Schedule 2 to the Bill provides for the transitional arrangements for certain entities that are providing tax agent services as defined in the *Tax Agent Services Act 2009* (TAS Act) before the commencement of the TAS Act.
- 3.3 Part 3, Division 1 of Schedule 2 to the Bill provides for the transitional arrangements for entities that have applied for registration or re-registration under Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936) (the current law requiring the registration of tax agents (current law)) and the relevant state Tax Agents' Board (state Board) has not decided their application before the commencement of the TAS Act.
- 3.4 Part 3, Division 2 of Schedule 2 to the Bill provides for the transitional arrangements for entities that have not made an application for registration under the current law, but the time period for making such applications has not expired at the time of commencement of the TAS Act.
- 3.5 Part 3, Division 3 of Schedule 2 to the Bill makes provision for new applications (under section 20-20 of the TAS Act) from entities that are not registered under the current law, but are providing specialist tax agent services (notably, this includes research and development (R&D) specialists). There are similar provisions for entities providing Business Activity Statement (BAS) services.
- 3.6 Part 5 of Schedule 2 to the Bill provides that certain decisions of the Tax Practitioners Board (Board) related to registration are reviewable by the Administrative Appeals Tribunal (AAT).
- 3.7 Part 8 of Schedule 2 to the Bill provides the form in which notification must be given to the Board.

Context of amendments

3.8 As the current law is repealed by the Bill (refer to paragraph 1.17), provision needs to be made to facilitate the transition of entities registered under the current law into the new regulatory regime for the provision of tax agent services provided in the TAS Act. Likewise, provision needs to be made to allow entities that are currently legally providing tax agent services or BAS services (within the meaning of the TAS Act) for a fee without registration to transition into the regime in the TAS Act.

3.9 Transitional provisions are also required to deal with applications for registration and re-registration that are on foot under the current law upon commencement.

Summary of new law

3.10 Existing registered tax agent and nominee registrations and re-registrations are deemed to be registrations and renewals under the TAS Act and existing but undecided applications for registration and re-registration that were lodged with a state Board are decided in accordance with the current law by the Board.

3.11 Certain entities that are currently providing tax agent services for a fee legally without being registered or that otherwise satisfy the conditions for the provision of those services (because such services are not currently regulated) are transitioned into the regime under the TAS Act.

3.12 Certain entities providing specialist tax agent services that apply for registration as a registered tax agent under the TAS Act are eligible for registration regardless of whether they meet the qualifications and relevant experience requirements for registration. This is intended to transition certain specialist tax service providers (such as those in the R&D field) who are not currently registered.

3.13 Certain entities that apply for registration as a registered BAS agent under the TAS Act before the end of the three-year period from commencement are eligible for registration regardless of whether they meet the qualifications and relevant experience requirements for registration.

3.14 Certain terms used in Schedule 2 to the Bill are defined in that Schedule. Other expressions used in Schedule 2 have the same meaning in that Schedule as in the TAS Act or in the *Income Tax Assessment Act 1997* (ITAA 1997).

Detailed explanation of new law

Explanation of the use of defined terms in Schedule 2 to the Bill

3.15 An expression used in Schedule 2 to the Bill that is also used in the TAS Act has the same meaning in Schedule 2 as it has in that Act. Likewise, but subject to those expressions used in the TAS Act, an expression used in Schedule 2 to the Bill that is also used in the ITAA 1997 has the same meaning in Schedule 2 as it has in that Act. *[Schedule 2, subitems 1(2) and (3)]*

3.16 When the term ‘commencement’ is used in Schedule 2 to the Bill, it means the commencement of Part 1 in Schedule 1 to the Bill. Refer to paragraphs 1.50 to 1.55 for further information about commencement. *[Schedule 2, subitem 1(1)]*

3.17 When the terms ‘old law’ and ‘new law’ are used in Schedule 2 to the Bill, they mean ‘Part VIIA of the ITAA 1936 as in force immediately before commencement’ and ‘the TAS Act’, respectively. *[Schedule 2, subitem 1(1)]*

3.18 For the purposes of this explanatory memorandum, *current law* has the same meaning as ‘old law’, being ‘Part VIIA of the ITAA 1936’.

3.19 When the term ‘Board’ is used in Schedule 2 to the Bill, it means the Board established under section 60-5 of the TAS Act. *[Schedule 2, subitem 1(1)]*

Transition of entities providing tax agent services and BAS services

3.20 The transitional provisions facilitate the transition of entities registered in the current tax agent registration regime into the new regulatory regime introduced by the TAS Act. The transitional provisions enable entities to continue to provide the services they were able to provide before commencement of the TAS Act, after commencement of the TAS Act. Entities will therefore be able to continue their day to day provision of services without disruption due to the change in law and without a detrimental impact on their livelihood.

3.21 Entities contemplated by Part 2 of the Bill are ‘taken to be registered’ under section 20-25 of the TAS Act. Accordingly, all of the provisions in the TAS Act (for example, obligations, responsibilities, powers of the Board) apply to those entities. To continue registration beyond the registration period specified in the relevant item in Part 2 of the Bill, an entity will apply for renewal in accordance with section 20-50 of the TAS Act.

Continuation of existing registration of registered tax agents and nominees

3.22 If, immediately before commencement an entity was a registered tax agent or registered nominee within the meaning of the current law, the entity is taken to be a registered tax agent under the TAS Act. [*Schedule 2, subitem 2(1) and item 3*]

3.23 Registered tax agents under the current law will be deemed to be registered tax agents under the TAS Act, as the requirements for registration under the current law are not substantially different from the requirements for registration under that Act, other than the removal of the ‘carry on business’ requirement. It is therefore appropriate that those entities that are registered under the current law be automatically transitioned into the new regulatory regime under the TAS Act.

3.24 Registered nominees under the current law will be deemed to be registered tax agents under the TAS Act. This is because the TAS Act removes the concept of ‘nominees’. Such ‘nominees’ are therefore now registered tax agents in their own right and not subject to the registration of their host tax agent.

Period for which registered tax agents and nominees transitioning will be taken to be registered tax agents under the TAS Act

3.25 Registered tax agents and nominees transitioning into the new regime are taken to be registered tax agents under the TAS Act for the period:

- beginning on commencement; and
- ending on the earliest of the following:
 - for a registered tax agent transitioning — the day on which the entity’s registration would have expired under the current law, were it not repealed (refer to paragraph 1.17);

- for a nominee transitioning — the day on which the entity’s registration would have ceased under the current law by virtue of the expiry of the nominee’s host tax agent’s registration (a nominee’s registration ceases to be in force when the nominee’s host tax agent’s registration expires);
- the day on which the entity’s registration is cancelled under the current law (despite the repeal of the current law), where item 17 of Schedule 2 to the Bill applies and the Board decides to cancel the entity’s registration (item 17 provides for the continuation of inquiries by a state Board — refer to paragraphs 4.18 to 4.28); and
- the day on which the entity’s registration is terminated under Subdivision 30-B (termination for failure to comply with the Code of Professional Conduct (Code)) or 40-A (termination of registration on certain other grounds) of the TAS Act.

(During the period when an entity is taken to be a registered tax agent after commencement, the Board may still suspend the entity under the TAS Act.) [*Schedule 2, subitem 2(1) and item 3*]

Example 3.1

Immediately before commencement (assume 1 January 2010), Hayden was a registered tax agent whose registration was due to expire on 1 April 2010. From commencement, Hayden will be taken to be a registered tax agent within the meaning of the TAS Act until 1 April 2010 (unless Hayden’s registration is terminated prematurely).

Hayden will need to apply for renewal of his registration under, and in accordance with, the TAS Act, which specifies that the application for renewal must be made at least 30 days before the day on which the registration expires. If Hayden makes an application for the renewal of his registration on 20 February, Hayden’s registration will continue in accordance with the TAS Act until a decision has been made by the Board.

Registered tax agents that are also nominees/multiple nominees

3.26 If an entity is both a registered tax agent and a registered nominee of a registered tax agent under the current law, then that entity simply transitions using its ‘tax agent’ status and hence their registration will continue under the TAS Act on the basis of their registered tax agent registration under the current law.

3.27 Likewise, if an entity is a registered nominee of more than one registered tax agent, the registration of such a nominee is, after commencement, taken to expire on the *latest* day that their registration could have continued under the current law — that is, its expiry will be determined with reference to whichever of the nominee’s host tax agent’s registration would have continued the longest.

Entities that are suspended at commencement

3.28 If, immediately before commencement, an entity was taken *not* to be a registered tax agent within the meaning of the current law because its registration was suspended, the entity’s registration is taken to have been suspended under section 30-25 (provisions regarding suspension) of the TAS Act. [*Schedule 2, subitem 2(2)*]

3.29 Entities whose registration is suspended at commencement are therefore transitioned into the regime under the TAS Act, even though they are not taken to be registered tax agents or nominees (for most purposes) upon commencement.

3.30 In accordance with subsection 30-25(4) of the TAS Act, such entities will be taken not to be a registered tax agent except for the purposes of Part 2 (registration), Subdivision 30-C (notifying a change of circumstances) and Part 4 (termination of registration). This means that during their period of suspension the Board may, amongst other things, impose further sanctions on the entity such as a further period of suspension.

3.31 Such an entity’s registration is taken to be suspended under the TAS Act for the period:

- beginning on commencement; and
- ending on the day on which the suspension would have ended under the current law, were it not repealed.

[Schedule 2, subitem 2(2)]

3.32 Once the period of suspension ends, the entity is taken to be a registered tax agent within the meaning of the TAS Act for the period:

- beginning on the day immediately after the day on which the suspension ends; and
- ending on the earliest of the following:
 - the day on which the entity’s registration would have expired under the current law, were it not repealed;

- the day on which the entity’s registration is cancelled by the Board under the current law (the Board may continue inquiries initiated by the state Boards and can continue to impose sanctions under the current law — refer to paragraphs 4.18 to 4.34); and
- the day on which the entity’s registration is terminated under Subdivision 30-B (termination for failure to comply with the Code) or 40-A (termination of registration on certain other grounds) of the TAS Act.

[Schedule 2, subitem 2(3)]

Example 3.2

Commencement is 1 January 2010. Prior to commencement, Sally’s registration as a registered tax agent was suspended until 17 September 2010 in accordance with the current law, after she was found guilty of incorrectly keeping records with the intention of deceiving or misleading the Commissioner of Taxation (Commissioner).

Upon commencement, as Sally was suspended, Sally is taken to have been suspended under the TAS Act. Sally’s suspension under the TAS Act will end on 17 September 2010. After that time, Sally will be taken to be a registered tax agent under the TAS Act until the original expiry date under the current law (unless Sally’s registration is terminated before that time).

Special rules for entities that are not currently required to register

3.33 The TAS Act regulates a slightly broader range of services than the current law. As a result, the Bill ensures that those entities providing a service that they are not currently required to be registered for, but will be required to register for under the TAS Act, are considered to be a registered tax agent or BAS agent after commencement. (Note that this transitional provision is not intended to cover those entities currently providing tax agent services where such entities are required to be registered. This would include R&D specialists. Special transitional rules apply to such entities. See paragraphs 3.87 to 3.93).

Entities providing tax agent services (that are not BAS services)

3.34 An entity that is not currently required to register to provide tax agent services (other than a BAS service) for a fee will be taken to be a registered tax agent within the meaning of the TAS Act for a period of two years beginning immediately after commencement. However the entity:

- must have been providing a tax agent service, other than a BAS service (within the meaning of section 90-10 of the TAS Act), for a fee immediately before commencement;
- must not have been required to register under the current law; and
- must notify the Board (notification must be in a particular form) that they are such a person within the three-month period beginning immediately after commencement.

[Schedule 2, subitem 4(1)]

3.35 As the entity must *notify* (rather than apply to) the Board, there is no requirement for the Board to consider an application. Notification gives the Board a record of those entities that are taken to be registered tax agents during the two-year period.

3.36 It is appropriate to provide a three-month limit within which such entities are able to access this transitional arrangement. This is because these entities are currently unregistered and can gain the benefits of registration through simply notifying the Board. They therefore represent a higher risk category of all those transitioning.

3.37 Refer to paragraphs 3.49 to 3.57 for the form of notification and the period and conditions of registration under this transitional provision.

Entities providing BAS services

3.38 Under the current law only registered tax agents and certain persons listed in subsection 251L(6) (entities exempt from registration) can provide BAS services for a fee. A transitional rule is necessary to ensure that these exempt entities are able to transition into the new law under the TAS Act.

3.39 A **BAS service** is defined under subsection 251L(7) of the current law as any of the following:

- preparing or lodging an approved form about a taxpayer's liabilities, obligations or entitlements under a BAS provision;

- giving advice about a BAS provision; or
- dealing with the Commissioner, or a person who is exercising powers or performing functions under a taxation law, in relation to a BAS provision.

3.40 Under subsection 995-1(1) of the ITAA 1997, **BAS provision** means:

- Part VII of the *Fringe Benefits Tax Assessment Act 1986*;
- the indirect tax laws; and
- Parts 2-5 and 2-10 on Schedule 1 to the *Taxation Administration Act 1953* (which are about the pay as you go system).

3.41 Entities who were providing BAS services (within the meaning of the current law) immediately before commencement, for a fee, but are currently exempt from the requirement to register (except for Customs brokers licensed under Part XI of the *Customs Act 1901*) will be taken to be a registered BAS agent within the meaning of the TAS Act for a period of two years beginning immediately after commencement. However, to access this transitional arrangement the individual must notify the Board (notification must be in a particular form) within the six-month period beginning immediately after commencement that:

- they are exempt from registration under the current law (subsection 251L(6)); and
- they were providing a BAS service immediately before commencement.

[Schedule 2, subitem 5(1)]

3.42 Customs brokers licensed under Part XI of the *Customs Act 1901* are exempt from registration under subsection 251L(6) of the current law. Customs brokers will not be transitioned into the new regime because the new regime provided for by the TAS Act continues to exempt such individuals from the requirement of registration (since they cannot be subject to a civil penalty under the TAS Act for providing the certain BAS service that they are exempt from registration for under the current law, without registration).

Example 3.3

Before commencement, Jordan is a bookkeeper working under the direction of a registered tax agent and is therefore not required to be registered under the current law (subsection 251L(6)). If Jordan notifies the Board in writing, within the six-month period after commencement, that he has been working as a bookkeeper under the direction of a registered tax agent to provide BAS services, he will be taken to be a registered BAS agent for the two-year period beginning immediately after commencement.

3.43 The TAS Act introduces a broader concept of BAS service than that used in the current law. Significantly, section 90-10 of the TAS Act includes in the definition of **BAS service** services relating to *ascertaining* liabilities, obligations and entitlements arising under a BAS provision (rather than merely *preparing or lodging* BAS forms about a taxpayer's liabilities, obligations or entitlements under a BAS provision).

3.44 As a result of the broadening of the definition of BAS service, this Bill ensures that those entities providing a BAS service under the TAS Act (where that service is not currently considered to be a BAS service) will, upon commencement, be taken to be a registered BAS agent within the meaning of the TAS Act for a period of two years beginning immediately after commencement. However, to access this transitional arrangement the entity must notify the Board (notification must be in a particular form) within the six-month period beginning immediately after commencement that:

- they were *not* a person providing a BAS service within the meaning of the current law who was exempt from registration; and
- they *were* an entity providing a BAS service within the meaning of the TAS Act.

[Schedule 2, subitem 5(2)]

Example 3.4

Alli completes calculations for her clients regarding the goods and services tax credits they can claim on the purchases they have made. She does not, however, prepare and lodge the BASs for her clients and is therefore not providing a 'BAS service' within the meaning of the current law.

Although the provision of Alli's services is not regulated by the current law, Alli will be required to register under the TAS Act in order to continue to provide her services for a fee. This is because she is providing a BAS service within the meaning of section 90-10 of the

TAS Act, namely services that relate to ascertaining clients' entitlements arising under a BAS provision.

If Alli notifies the Board in writing, within the six-month period after commencement, that she was unregistered but legally providing services that are now captured by the definition of BAS service in the TAS Act, she will be taken to be a registered BAS agent for a two-year period commencing from commencement.

In this situation, it would not be unusual if the Board placed conditions on Alli's registration as a registered BAS agent.

Example 3.5

Deaken is a bookkeeper and is providing BAS services for a fee to his clients before commencement. Deaken is not a registered tax agent and is not exempt from registration under subsection 251L(6) of the current law. He is therefore providing BAS services illegally.

Deaken is not a person that will be transitioned into the new regulatory framework under the TAS Act as he is not legally providing BAS services within the meaning of the TAS Act immediately before commencement.

3.45 An entity is taken to be a registered BAS agent for the two-year period beginning immediately after commencement, provided it assesses itself against the criteria correctly and, if applicable, notifies the Board that it is an entity to which the transitional provision applies. As the requirement is to notify, not to apply, the Board is not required to consider the notification.

3.46 Refer to paragraphs 3.49 to 3.57 for the form of notification and the period and conditions of registration under this transitional provision.

What is meant by 'immediately' before?

3.47 The transitional provisions in Part 2 of the Bill use the wording 'immediately before commencement', in relation to when an entity was registered/the state of an entity or when an entity was providing a particular service.

3.48 *Immediately before commencement* is not intended to mean only a period of time just prior to commencement but is also intended to convey the notion of a continuing provision of services. For example, if an entity provided one tax agent services the day before commencement, it would not be expected that the entity be able to access the transitional provisions. Guidelines may be provided by the Board in relation to such terms, indicating how the Board will administer the provisions.

Period and conditions of registration

3.49 Notification to the Board must be in a form approved by the Board, contain any information, statement or document required by the Board and be provided in a manner required by the Board. [*Schedule 2, item 25*]

3.50 The Board may find it helpful to specify what additional information it would like to know about the transitioning entity. Likewise, upon receiving a notification, the Board has the power under the TAS Act to seek additional information from the entity or commence an investigation if it considers it necessary.

3.51 Entities taken to be a registered BAS agent or registered tax agent within the meaning of the TAS Act are taken to be registered under section 20-25 of that Bill for a two-year period beginning immediately after commencement. At least 30 days before expiration of the two-year period, the entity needs to apply to the Board for renewal of its registration, and then registration is taken to continue until the Board decides the application in accordance with section 20-50 of the TAS Act. (Refer also to paragraphs 3.94 to 3.100 for an explanation of further provisions that may be accessed by entities taken to be registered BAS agents under the TAS Act after the two-year transitional period has ceased.)

3.52 All of the provisions in the TAS Act (for example, obligations, responsibilities, powers of the Board) apply to entities that are 'taken to be registered' under the TAS Act. Therefore, entities taken to be registered tax agents by virtue of these transitional provisions will be subject to the Code and civil penalty provisions under the TAS Act. Accordingly, any of the sanctions under the TAS Act may apply to the entity. This ensures that those transitioned into the regulatory regime under the TAS Act are competent to provide tax agent services.

3.53 The Board may consider pre-commencement conduct when applying sanctions under the TAS Act. The Board may consider pre-commencement conduct/actions when deciding to terminate the registration of entities that have transitioned into the new regulatory regime, including those that transition via notification. For example, if the Board is not satisfied, once receiving notification and information from an individual, that the individual does not meet the fit and proper person requirements because of pre-commencement actions (for example, becoming an undischarged bankrupt), the Board can terminate the individual's registration under paragraph 40-5(1)(b) of the TAS Act, because the individual would cease to meet one of the tax practitioner registration requirements. (The term 'tax practitioner registration requirements' is defined in section 90-1 of the TAS Act.)

3.54 Even though the individual was an undischarged bankrupt at the time it transitioned into the new regulatory regime and therefore did not technically meet the tax practitioner registration requirements at that time, the Board may still terminate the individual for *ceasing* to meet the requirements. (Paragraphs 4.29 to 4.34 relate to the Board's power to consider pre-commencement conduct.)

3.55 To avoid doubt, if an entity is taken to be registered as outlined in paragraphs 3.34, 3.41 or 3.44, the Board may, in accordance with the TAS Act, impose conditions to which the entity's registration is subject and/or require the entity to maintain professional indemnity insurance as if that entity had applied for registration and the Board had decided to grant the application. [*Schedule 2, subitems 4(2), 5(3) and (4)*]

3.56 It would be expected that many entities accessing the transitional provisions by virtue of item 4 or subitem 5(2) of the Bill will have a condition placed on their registration by the Board to limit the tax agent services it can provide. It would be expected that the condition would enable the entity to provide only those tax agent services the entity was providing before commencement. This allows the entity to continue to provide services, while also managing the consumer risk associated with transitioning entities that are not within the current regulatory regime.

3.57 A decision by the Board to impose conditions and a decision by the Board to require an entity to maintain professional indemnity insurance are reviewable by the AAT under section 70-10 of the TAS Act, for which the entity can make an application to the AAT. Refer to paragraph 4.46. [*Schedule 2, subparagraphs 18(2)(a)(i) and (ii) and 18(2)(b)(i) and (ii)*]

Pending applications for registration and re-registration

3.58 Broadly, decisions made by the Board regarding registration applications or re-registration applications that are on foot upon commencement are made in accordance with the current law. The time frames for making decisions are consistent with the TAS Act.

Tax agents and nominees

3.59 Where an entity has applied for original registration as a registered tax agent or re-registration as a registered tax agent under the current law (section 251J or 251JB, respectively) and the relevant state Board has not decided the application before commencement, then the Board must decide the application in accordance with the registration requirements in the current law (being section 251JA for original registration and section 251JC for re-registration). [*Schedule 2, paragraphs 6(1)(a) to (c) and 7(1)(a) to (c)*]

3.60 Sections 251JA and 251JC of the current law require companies and partnerships that apply for registration or re-registration to specify an original nominee of the entity. Given that, on commencement, all nominee registrations are taken to be registrations as a registered tax agent (refer to paragraph 3.10), in deciding an application in accordance with the current law, the Board will need to ensure that the original nominee specified in the application is a partner (in the case of a partnership application) or an employee (in the case of a company application) who is taken to be a registered tax agent on commencement.

3.61 Where an entity has applied for registration or re-registration of a nominee under the current law (section 251KB) and the relevant state Board has not decided the application before commencement, then the Board must decide the application in accordance with the nominee registration and re-registration requirements of the current law (being section 251KC). *[Schedule 2, paragraphs 8(1)(a) to (c) and 9(1)(a) to (c)]*

3.62 The Board must decide registration and re-registration applications for both registered tax agents and nominees within six months after commencement. This is consistent with the time limits for registration decisions under the TAS Act and provides finality to those applications that are pending upon commencement. (The current law does not impose a time frame on registration decisions by the state Boards.) *[Schedule 2, paragraphs 6(1)(c), 7(1)(c), 8(1)(c) and 9(1)(c)]*

3.63 If the Board decides to grant the application for registration or re-registration in accordance with the current law, the Board:

- must register the entity or nominee (as appropriate) as a registered tax agent under section 20-25 of the TAS Act;
 - In accordance with section 20-25, the Board may impose conditions to which the entity's registration is subject.
- must notify the entity and nominee (if appropriate) of its decision in accordance with section 20-30 of the TAS Act; and
 - Under section 20-30 the Board must notify of its decision to grant registration within 30 days of its decision. Notification by the Board must be in writing and must include the period of registration and any conditions to which the registration is subject.

- may require the entity or nominee (as appropriate) to maintain professional indemnity insurance in accordance with subsection 20-30(3) of the TAS Act.

[Schedule 2, paragraphs 6(1)(d), 7(1)(d), 8(1)(d) and 9(1)(d) and subitems 6(3), 7(3), 8(3) and 9(3)]

3.64 If the Board decides to grant the registration, it is reasonable that the entity (and nominee, where appropriate) be notified in accordance with the TAS Act. Notification under that Bill also ensures that the Commissioner is notified of the Board's decision.

3.65 If the Board decides to reject the application, the Board must notify the entity and nominee, where appropriate, of its decision in accordance with the current law as follows:

- for a registration decision — notification must be in accordance with subsection 251JA(3) (for registered tax agents) or 251KC(3) (for nominees) and section 251QB (regarding statements to accompany notification of decisions); and
- for a re-registration decision — notification must be in accordance with subsection 251JC(3) (for registered tax agents) or 251KC(3) (for nominees) and section 251QB.

[Schedule 2, paragraphs 6(1)(e), 7(1)(e), 8(1)(e) and 9(1)(e)]

3.66 Subsections 251JA(3), 251JC(3) and 251KC(3) of the current law require the Board to notify the entity in writing of the decision to reject the application and the reasons for that decision. Section 251QB requires the Board to include a statement in certain notices, including notices made under subsections 251JA(3), 251JC(3) and 251KC(3), stating that the entity has the right to make an application to the AAT for review of the decision, if it is dissatisfied with the decision.

3.67 The Board is taken to have rejected the application if it has not made its decision within six months after commencement. This is consistent with the approach adopted in the TAS Act. *[Schedule 2, subitems 6(2), 7(2), 8(2) and 9(2)]*

Additional rules for re-registration applications

3.68 An entity whose application for re-registration is pending upon commencement is taken to be a registered tax agent for the period:

- beginning on commencement (for an explanation of 'commencement', see paragraphs 1.50 to 1.55); and

- ending on the earlier of:
 - the day on which the Board makes its decision regarding the application for re-registration; or
 - the day that occurs six months after commencement.

[Schedule 2, subitems 7(4) and 9(4)]

3.69 This approach is broadly consistent with the approach taken in subsection 251JC(4) of the current law, with the addition of a six-month limitation. Subsection 251JC(4) provides that in the case where a state Board decides to refuse a registered tax agent's re-registration application and the notice of the refusal occurs after the date of the registered tax agent's registration expiry, then the registered tax agent is taken to be registered for the period from expiry until the time of notification of the state Board's decision. This additional rule for pending re-registration applications will ensure that entities will not be considered unregistered and hence have to cease providing services simply because they have not been notified by the Board of its decision.

3.70 Under the current law, entities seeking re-registration must normally make their application during the period 60 to 30 days before expiry. They may, however, request that a state Board allow them to make their application during the 30 days before the expiry date. If such a request has been made to a state Board under paragraph 251JB(4)(b) (for registered tax agents) or paragraph 251KB(4)(b) (for nominees) and the relevant state Board has not made a decision before commencement, then the Board must make a decision in accordance with section 251JB (in the case of registered tax agents) or 251KB (in the case of nominees) of the current law. *[Schedule 2, subitems 7(5) and 9(5)]*

3.71 If the Board decides to allow such a request, the entity may apply for re-registration within the time decided by the Board. When the entity applies for re-registration, even though the TAS Act will be in force, the entity is taken to have applied to a state Board for re-registration as if it had applied under the current law prior to commencement. *[Schedule 2, paragraphs 7(5)(d) and 9(5)(d)]*

3.72 If the Board decides to refuse the request, the Board must notify the applicant (and specified nominee/s, in the case of a company or partnership application) in writing of the decision to refuse the request and the reasons for the decision in accordance with subsections 251JB(5) and 251KB(5) of the current law (which require the Board to provide a notice in writing that sets out its decision to refuse to allow a later time for the making of an application for re-registration and giving reasons for that decision). *[Schedule 2, paragraphs 7(5)(e) and 9(5)(e)]*

3.73 The notice must also include a statement informing the recipient/s of the notice that the Board's decision is reviewable by the AAT under section 251QB of the current law. Absence of this statement, however, does not affect the validity of the Board's decision. [*Schedule 2, paragraphs 7(5)(e) and 9(5)(e)*]

Successor tax agents — changes in the constitution of a partnership

3.74 Under the current law, when the constitution of a partnership (*original partnership*) changes, the registration of that partnership is terminated. The new partnership can apply to a state Board for a new registration as long as a partner of the new partnership was a partner, and a registered nominee, of the original partnership immediately before the termination, there is no partner who is an undischarged bankrupt and the registration of the original partnership was not suspended immediately before the termination.

3.75 In addition, under the current law a person who was a partner and a registered nominee of the original partnership immediately before the termination may apply to a state Board for registration as a registered tax agent, provided that partner is not an undischarged bankrupt.

3.76 The treatment of partnerships under the TAS Act is quite different. Under that Bill, if the constitution of a partnership changes, the registration of that partnership is not terminated. Therefore a change in the constitution of a partnership does not affect the continuity of that partnership's registration. Under the TAS Act, a registered partnership must notify the Board within 30 days of the day on which the partnership becomes, or ought to have become, aware that the composition of the partnership changed.

Partnership registration terminated and decision not made by state Board before commencement

3.77 If the registration of a partnership was terminated under the current law because there was a change in the constitution of the partnership and, at commencement:

- a person mentioned in paragraph 3.75 or a new partnership mentioned in paragraph 3.74 had applied to a state Board for registration as a registered tax agent in accordance with subsection 251JE(1) or (2) of the current law, as appropriate; and

- the relevant state Board had not yet registered the person or new partnership under section 251JF of the current law,

then, despite section 251JD of the current law (termination because of a change in partnership), the original partnership's registration is taken not have been terminated at the time of the change in the constitution of the original partnership. [*Schedule 2, subitems 10(1) and (2)*]

3.78 Because the original partnership's registration will be taken not to have terminated, the transitional arrangements described in paragraph 3.22 will apply to the partnership and its nominee/s.

Partnership registration terminated and first application rejected by state Board before commencement

3.79 Under the current law, certain time limits and special provisions apply to the making of applications for registration as a successor tax agent following termination of registration due to a change in the constitution of a partnership. Broadly speaking, an application must be made within 30 days after the original partnership's registration terminated. If a state Board is of the opinion that the application made is not in accordance with the requirements in the current law, and the notice of that opinion is given, at the earliest, 21 days after termination of the original partnership's registration, then the applicant has a further period of seven days (under subsection 251JE(9)) in which to resubmit its application. Because of the changed approach to the continuity of partnerships (and therefore partnership registration in the case of a change in constitution), under the TAS Act, transitional provisions are required to accommodate situations where commencement occurs during the 30-day period or during the subsequent seven-day period granted by a state Board.

3.80 In situations where the seven-day period for resubmitting an application under subsection 251JE(9) of the current law has not expired at commencement, the applicant may resubmit its application for registration as a successor tax agent in accordance with section 251JE within seven days after commencement. The applicant may do so where:

- a state Board received a document from the entity purporting to be an application made in accordance with section 251JE of the current law (application for registration as a successor tax agent);

- the state Board was of the opinion that the document was not an application made in accordance with 251JE and notified the entity of that opinion before commencement in accordance with subsection 251JE(8);
- the seven-day period mentioned in subsection 251JE(9) has not expired at commencement; and
- the entity has not yet re-made an application under section 251JE as allowed by subsection 251JE(9).

[Schedule 2, paragraphs 10(3)(a) to (e)]

3.81 If the Board is of the opinion that the entity has applied in accordance with section 251JE of the current law, the Board:

- must register the entity as a registered tax agent under section 20-25 of the TAS Act;
- must notify the entity of its decision in accordance with section 20-30 of that Act; and
- may impose conditions to which the entity's registration is subject and/or require the entity to maintain professional indemnity insurance in accordance with that Act.

[Schedule 2, paragraph 10(3)(f) and subitem 10(4)]

Example 3.6

Before commencement, Billy is a partner and a registered nominee of a partnership, YUU & Partners, which is a registered tax agent under the current law. YUU & Partners' registration is terminated because the constitution of the partnership changes.

Within the required timeframe in the current law, Billy submits an application to a state Board for registration as a successor tax agent. Billy was notified by the state Board that it was of the opinion that the document submitted by Billy was not an application made in accordance with section 251JE of the current law. Three days later, the TAS Act commenced.

Billy had not re-made his application for registration as a successor tax agent before commencement. Under the Bill, Billy has seven days from commencement to re-submit his application for registration as a successor tax agent to the Board.

Application not yet made

Successor tax agents — changes in the constitution of a partnership

Partnership registration terminated and application not made before commencement

3.82 If the registration of a partnership was terminated under the current law because there was a change in the constitution of the partnership and, at commencement:

- a person mentioned in paragraph 3.75 or a new partnership mentioned in paragraph 3.74 had not applied to a state Board for registration as a registered tax agent in accordance with subsection 251JE(1) or (2) of the current law, as appropriate; and
- the 30-day period within which an application had to be made (as mentioned in subsection 251JE(4) of the current law) had not expired,

then, despite the repeal of the current law, the person or new partnership may apply to the Board in accordance with subsection 251JE(1) or (2) of the current law, as appropriate, within the balance of the 30-day period. *[Schedule 2, subitems 12(1) and (3)]*

3.83 If a person or the new partnership makes such an application, then despite section 251JD of the current law (termination because of a change in partnership), the original partnership's registration is taken not to have been terminated at the time of the change in the constitution of the original partnership. *[Schedule 2, subitems 12(2) and (4)]*

3.84 These provisions ensure that a person or new partnership retains the ability to make an application to the Board for successor registration under the current law where the 30-day period for making such an application has not expired, notwithstanding the repeal of the current law from commencement. A person or new partnership will have the time from commencement until the 30-day period would have expired under the current law to apply to the Board.

3.85 Provided an application is made which complies with the requirements in subsection 251JE(1) or (2), as appropriate, the original partnership's registration will be taken not to have terminated and the transitional arrangements described in paragraph 3.22 will apply to both the partnership and its nominee/s.

New applications for registration as a tax agent or BAS agent

3.86 The Bill also provides for new applications under the TAS Act for registration as a registered tax agent or as a registered BAS agent. The provisions enable certain entities to be eligible for registration under the TAS Act despite not meeting the qualifications and relevant experience requirements for registration.

Registration as a tax agent — entities providing specialist tax agent services

3.87 Under the current regulatory regime there may be some entities providing specialist tax agent services that are not currently registered. This may include, for instance, individuals providing tax services in the R&D field and quantity surveyors.

3.88 In many instances, such entities are competently providing a tax agent service in a specialised field (in relation to which they are well qualified) and have found, because of the current registration requirements, that they are unable to register as a registered tax agent.

3.89 The new regulatory regime and these transitional provisions provide an opportunity to address these issues and ensure that such specialist tax agent service providers are effectively brought within the new regime.

3.90 This is achieved through ensuring that such entities, despite not meeting the eligibility requirement to be prescribed by the regulations (see paragraphs 20-5(1)(b), (2)(c) and (3)(d) of the TAS Act) are still eligible for registration where:

- they apply for registration under the TAS Act within six months of commencement;
- immediately before commencement, the entity was providing a tax agent service within a particular area of the taxation laws; and
- the Board is satisfied that the entity has been providing that tax agent service to a competent standard for a reasonable period before making the application (what constitutes a ‘reasonable period’ will be determined by the Board).

[Schedule 2, subitem 13(1)]

3.91 Despite not meeting the eligibility requirement to be prescribed by the regulations (including the qualification and relative experience requirements) the entity will still need to meet the fit and proper person requirements in the TAS Act. Therefore, the Board will need to be satisfied that the fit and proper person requirement is met before an entity can transition into the new regime via this item. This will enable the Board, for instance, to distinguish between entities providing a tax agent service that have failed to register for a bona fide reason and other unregistered entities.

3.92 So as to ensure that, prior to the Board making its decision regarding the entity's registration, the entity can continue to lawfully provide tax agent services, the entity will be considered to be registered from commencement until the Board makes its decision. [*Schedule 2, subitem 13(2)*]

Period and effect of registration of specialist entities

3.93 Once the Board makes a decision to grant registration, that registration is granted under the TAS Act, and is therefore for a period of at least three years as determined by the Board. This allows them sufficient time to obtain the necessary qualifications and/or experience in order to meet all of the registration requirements at the time of renewal.

Example 3.7

Tony is an R&D Specialist. Tony provides a tax agent service (advice in relation entitlements under section 73B of the ITAA 1936). (Commencement is 1 January 2010.)

Tony applies for registration as a registered tax agent under section 20-20 of the TAS Act on 1 March 2010. Despite not meeting the eligibility requirement to be prescribed by the regulations (qualification and relevant experience requirements), Tony is eligible for registration if the Board is satisfied that Tony has been providing that tax agent service to a competent standard for a reasonable period before making the application.

Registration as a BAS agent

3.94 Entities seeking registration as a registered BAS agent will benefit from a three-year period during which they can apply for registration without meeting the educational qualifications and relevant work experience requirements to be prescribed by regulations provided certain conditions are met.

3.99 To overcome this situation, the Bill ensures that where an individual has transitioned into the new regime by virtue of item 5 (and is therefore taken to be registered for two years following commencement) and has applied for registration under item 14 without the necessary qualification or experience requirements, the Board is able to grant that additional registration for a period of 12 months (or more). That is, the Board is not restricted to granting a minimum level of three years registration as would otherwise be the case. *[Schedule 2, subitem 14(2)]*

3.100 This arrangement ensures that entities currently providing BAS services without the education or experience required by the new regulatory regime are able to transition into the new regime and will have sufficient, though not excessive, time to obtain the necessary qualifications and/or experience in order to meet all of the registration requirements at the time of renewal.

Example 3.8

On commencement, Tony is taken to be a registered BAS agent under the TAS Act for a period of two years. More than six months before the end of the two-year period after commencement, Tony applies to the Board for registration as a registered BAS agent, although he does not meet the educational qualifications and relevant experience requirements for registration.

Despite not meeting the education qualifications and relevant experience requirements for registration, Tony will be eligible for registration if the Board is satisfied that he has been providing BAS services competently for a reasonable period. If the Board is satisfied that Tony has been providing services competently for a reasonable period, Tony will be registered as a registered BAS agent under the TAS Act for a minimum of 12 months.

In this situation, Tony will have at least, approximately, three years from commencement to transition into the TAS Act and obtain the educational qualifications and relevant experience requirements, provided the Board grants his registration as a registered tax agent.

Refund of lodgment fees in certain circumstances

3.101 If an application is made under certain sections of the current law, being sections 251J, 251JB or 251KB (applications for registration and re-registration of registered tax agents and nominees) and the applicant withdraws the application after commencement, but before a decision is made by the Board in regard to their application, then the Commissioner is required to refund the lodgment fees paid under the current law, to the applicant. *[Schedule 2, item 11]*

3.102 This saves the current law so it can be applied to registration applications that have been made but not decided before commencement, and those new or pending applications that are made under the current law after commencement. (Although a similar provision exists in the TAS Act, it applies only to applications made under that Act.)

Chapter 4

Transition of the state Tax Agents' Boards to the Tax Practitioners Board

Outline of chapter

4.1 Part 4 of Schedule 2 to this Bill provides for the transitional arrangements regarding the references to, and things done by, or in relation to, a Tax Agents' Board (state Board) under Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936) (current law). Part 4 of Schedule 2 to the Bill also provides for the transitional arrangements to facilitate the continuation of inquiries by the state Boards.

4.2 Part 5 of Schedule 2 to the Bill provides for the transitional arrangements regarding the review of decisions of the state Boards and transitional decisions of the Tax Practitioners Board (Board) by the Administrative Appeal Tribunal (AAT).

4.3 Part 6 of Schedule 2 to the Bill provides for the transitional arrangements that relate to legal proceedings.

4.4 Part 7 of Schedule 2 to the Bill provides for the reporting and disclosure obligations and the transfer of custody of records from the state Boards to the Board.

4.5 Part 8 of Schedule 2 to the Bill provides for the making of transitional regulations by the Governor-General to carry out or give effect to matters of a transitional nature.

Context of amendments

4.6 Currently there are six state-based Boards that register tax agents and administer the current law relating to the registration and regulation of registered tax agents.

4.7 The *Tax Agent Services Act 2009* (TAS Act) introduces a new regulatory regime and establishes a national Tax Practitioners Board (Board) to replace the state Boards. The Board has the general administration of the TAS Act, a function which is currently performed

(in respect of Part VIIA of the ITAA 1936) by the Commissioner of Taxation (Commissioner).

4.8 This Bill provides for the transition of functions of the state Boards under the current law to the national Board under the TAS Act.

Summary of new law

4.9 The Board takes the place of the current state Boards. This means that:

- things done by the state Boards will become things done by the Board;
- references to a state Board in an instrument will be taken to be a reference to the Board;
- inquiries underway by a state Board will be considered by the Board, and evidence, information or documents required to be given to a state Board will be required to be given to the Board;
- the Board will step into the shoes of the state Boards in any pending legal proceedings; and
- records in the custody of the state Boards will be transferred into the custody of the Board.

4.10 Despite the repeal of the current law, a right to review a decision by a state Board under the current law will remain available after commencement. In addition, a right to review of a decision will be available where a decision that would otherwise have been made by a state Board is made after commencement by the Board under the Bill.

4.11 Regulations may be made prescribing certain matters related to Schedule 2 to the Bill and matters of a transitional nature relating to the amendments or repeals made by Schedule 1 to the Bill.

Detailed explanation of new law

References to and things done by or in relation to a Tax Agents' Board

Things done by or in relation to a Tax Agents' Board

4.12 If a thing was done by, or in relation to, a state Board under the current law, then after commencement, for the purposes of the operation of any law, the thing is taken to have been done by, or in relation to, the Board. A thing done includes the making of an instrument. [*Schedule 2, subitems 15(1) and (3)*]

4.13 Among other things, this provision allows the Board to step into the shoes of a state Board for the purpose of appealing an adverse decision made against a state Board.

Example 4.1

Before commencement, ZYX Tax Services Ltd, a registered tax agent, seeks review by the AAT of a decision of a state Board to cancel its registration. The AAT decides to set aside the state Board's decision to cancel ZYX Tax Services Ltd's registration and substitutes a decision that ZYX Tax Services Ltd's registration not be cancelled.

The TAS Act commences shortly thereafter. Following commencement, the Board decides to appeal the decision of the AAT to the Federal Court of Australia. The Board is able to appeal to the Federal Court because the Board is able to step into the shoes of the state Boards and, had the current law not been repealed upon commencement, the state Board would have been able to lodge such an appeal.

4.14 Despite this general rule, the Minister (being a Treasury portfolio Minister) may, by writing, determine that a particular thing done by, or in relation to, a state Board is not to be taken to have been done by or in relation to the Board. That is, the Minister may determine that the general rule does not apply in relation to a specified thing done by a state Board. This provides flexibility for the Minister to ensure that the appropriate outcome is achieved in all circumstances. [*Schedule 2, subitem 15(2)*]

4.15 The Bill specifies that a determination by the Minister is not a legislative instrument, because it is not an instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is included in the Bill merely to assist readers. [*Schedule 2, subitem 15(4)*]

References in instruments to a Tax Agents' Board

4.16 If an instrument contains a reference to a state Board and the instrument is in force immediately before commencement, then after commencement the instrument has effect as if the reference to the state Board were instead a reference to the Board. *[Schedule 2, subitem 16(1)]*

4.17 Similar to above, the Minister may, by writing, determine that this general rule does not apply in relation to a specified reference to a state Board. To assist readers, the Bill specifies that any such determination is not a legislative instrument, because it is not an instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. *[Schedule 2, subitems 16(2) and (3)]*

Continuation of inquiries by a Tax Agents' Board where a 'show cause notice' has been issued

4.18 If a state Board had given an entity a 'show cause notice' before commencement, then the Board must make a decision within 60 days after commencement as to whether or not to investigate the entity. *[Schedule 2, paragraph 17(1)(a)]*

4.19 A ***show cause notice*** means a written notice to an entity that:

- sets out the grounds on which the state Board is giving the notice;
 - In setting out the grounds on which the notice is given, the notice may include, for example, a reference to the legislative provisions relevant to the grounds.
- invites the entity to respond in writing to the state Board addressing the grounds on which the notice has been given; and
- states the period within which the entity must give the written response to the state Board.

[Schedule 2, subitem 17(5)]

4.20 If the Board decides to commence an investigation under the TAS Act, then it must:

- notify the entity in accordance with section 60-95 of the TAS Act. This section provides that the notice must be in writing and must be given within two weeks after the decision to investigate is made;

- carry out its investigation in accordance with the process required or allowed by Subdivision 60-E of the TAS Act as if the Board were investigating conduct that may breach that Act. Subdivision 60-E provides for such things as the collection of evidence by the Board, the period during which a decision must be made following an investigation and the notification requirements; and
- take whatever action in relation to the entity as is allowed by the current law (despite its repeal by Schedule 1 to this Bill) and as the Board considers appropriate.

[Schedule 2, paragraph 17(1)(b)]

4.21 Although the Board must carry out its investigations in such circumstances in accordance with the process required or allowed by Subdivision 60-E of the TAS Act, where a formal show cause notice has been issued it is appropriate for the Board to be bound to apply sanctions under the current law. Accordingly, following an investigation, the Board may, in accordance with the current law, either suspend or terminate the entity's registration or decide to take no further action.

4.22 If the Board decides, after carrying out an investigation as mentioned in paragraph 4.20, to suspend an entity (under the current law), then the entity is taken not to be a registered tax agent within the meaning of the TAS Act while it is suspended, except for the purposes of the following Parts in that Bill:

- Part 2 (Registration);
- Part 3 (The Code of Professional Conduct (Code)); and
- Part 4 (Termination of registration).

[Schedule 2, subitem 17(3)]

4.23 This ensures that an entity whose registration is suspended may nevertheless apply for renewal of registration during the period of suspension, that the entity is bound by the Code and the obligation to notify the Board of a change in circumstances and that the grounds for termination of registration continue to apply. This is consistent with the treatment of entities whose registration is suspended under section 30-25 of the TAS Act.

4.24 If the Board decides *not* to commence an investigation, it must notify the entity in writing that no further action will be taken in relation

to the show cause notice. This notification in writing must be made within 30 days of the Board's decision. *[Schedule 2, paragraph 17(1)(c)]*

4.25 If the Board fails to make a decision within 60 days after commencement, then the Board is taken to have decided not to investigate the entity. *[Schedule 2, subitem 17(2)]*

4.26 The 60-day timeframe will ensure that investigations/complaints that have already progressed to the 'show-cause notice' phase are progressed without delay to provide certainty to the entity subject to the investigation.

4.27 Complaints or inquiries that may be on foot under the current law upon commencement may relate to the following provisions:

- section 251BC or 251KC, which relates to whether or not a person is a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers in income tax matters;
- section 251JA or 251JC, which relates to the requirements for registration and re-registration, respectively; or
- section 251K or 251KE, which relates to the reasons for which a state Board may cancel or suspend an entity's registration.

4.28 If a state Board required a person to provide evidence, information or any document and it was not provided to the state Board before the commencement time, then the evidence, information or document must be provided to the Board. *[Schedule 2, subitem 17(4)]*

Pre-commencement conduct not subject to a 'show cause' notice

4.29 Not all conduct that is undertaken pre-commencement that may warrant investigation or ultimately some form of sanction will be subject to a formal show cause notice by a state Board.

4.30 This would include conduct that the Australian Taxation Office (ATO) or the state Boards are unaware of at the time of commencement. It would also include investigations underway by the ATO. Under the current arrangements between the state Boards and the ATO, it is often the ATO that undertakes preliminary investigations into conduct that may ultimately warrant a sanction under the current law. This would include conduct relating to the provision of tax agent services by an unregistered entity (in which case, sanctions may be pursued by the Commissioner) or

inappropriate conduct by a registered entity (in which case sanctions may be pursued by the state Boards).

4.31 If it considers it appropriate, the Board retains the ability to sanction such pre-commencement conduct under the current law. This is a result of Part 4 of Schedule 2 to the Bill (see paragraphs 4.12 to 4.15) and section 8 of the *Acts Interpretation Act 1901*.

Example 4.2

On 30 August 2009, the ATO receives a complaint against Tony, a registered tax agent, about inappropriate behaviour that may be relevant to whether he is a fit and proper person. The ATO commences a preliminary investigation and notified Tony that he is under review.

On 1 January 2010 the TAS Act commences and the ATO forwards information about the complaint against Tony to the Board. After concluding its investigation, the Board determines that Tony's registration should be suspended, it can make such a decision under section 251K of the current law.

4.32 In addition to being able to apply sanctions under the current law in relation to pre-commencement conduct, the Board also has the option of imposing sanctions under the TAS Act. Notably, conduct or events that occurred prior to commencement may be directly relevant to the Board's decision to terminate a tax agent or Business Activity Statement (BAS) agent's registration under Part 4 of the TAS Act.

4.33 This may include pre-commencement conduct that goes to whether or not a registered tax agent or BAS agent is a 'fit and proper' person or some other event (such as bankruptcy or the conviction of an offence) that, under the TAS Act, can form the basis of the Board's decision to terminate registration. The requirement in the TAS Act that the Board's discretion to terminate registration where an event *occurs* or a tax agent or BAS agent *ceases* to meet the requirement to be a fit and proper person should not be taken to limit the Board's consideration to only conduct or events that occurs after commencement.

Example 4.3

On 31 December 2009, Ricardo, a registered tax agent, is declared bankrupt. On 1 January 2010, the new regulatory regime commences and Ricardo transitions into the new regime as a registered tax agent. Some weeks later the Board learns of Ricardo's bankruptcy and can terminate his registration in accordance with Part 4 of the TAS Act.

4.34 Pre-commencement conduct cannot constitute a ‘breach’ of the Code. This is appropriate as a registered tax agent or BAS agent should not be held to the professional standard required by the Code in relation to conduct that occurred when the Code did not exist. Of course, pre-commencement conduct when combined with conduct after commencement may establish a pattern of behaviour. This could be relevant to the Board determining an appropriate sanction for a breach of the Code.

Unregistered entities

4.35 The Commissioner is currently responsible for investigating and pursuing action against unregistered entities under the current law. While this responsibility will be transferred to the Board after commencement, the Commissioner will remain responsible for the actions of unregistered entities (such as, unregistered entities illegally providing tax agent services) that occur prior to commencement.

Legal proceedings

Continuation of pending legal proceedings

4.36 If any proceedings were pending in any court or tribunal immediately before commencement to which a state Board was a party, the Board is substituted for the state Board, after commencement, as a party to the proceedings. This ensures that, after commencement, pending proceedings may continue notwithstanding the dissolution of the state Boards. *[Schedule 2, item 19]*

Legal proceedings by taxpayers to recover penalties or interest charges

4.37 Section 251M of the ITAA 1936 and section 120 of the *Fringe Benefits Tax Assessment Act 1986* provide a taxpayer with a right to sue their registered tax agent for the amount of a penalty (including general interest charge or shortfall interest charge) where the penalty was imposed as a result of the agent’s negligence.

4.38 While these provisions will be repealed by Schedule 1 to the Bill (refer to paragraph 1.10 and 1.17), the effect of these provisions will be retained in relation to penalties that have been (or will be) imposed in relation to negligence by a tax agent prior to commencement. *[Schedule 2, item 20]*

Example 4.4

Anna engages Dan, a registered tax agent, to complete her income tax return for the 2008-09 income year. Dan submits Anna's tax return to the ATO in October 2009.

The TAS Act commences in early 2010.

In February, shortly after commencement, Anna receives a notice from the ATO that she has understated her income earned in 2008-09 and thus her tax payable has increased. Anna had provided all relevant information to Dan and his negligence, before commencement of the TAS Act, caused her to have a tax shortfall. This tax shortfall has also exposed her to a shortfall interest charge.

Although section 251M was repealed when the TAS Act commenced, Anna retains her right to sue for and recover from Dan the shortfall interest charge that she has incurred as a result of Dan's negligence.

Special rule relating to the civil penalty for employing or using the services of a deregistered entity

4.39 Section 50-25 of the TAS Act provides for a civil penalty where a registered tax agent or BAS agent:

- employs or uses the services of an entity to provide tax agent services on its behalf;
- in circumstances where it knows, or ought reasonably to know, that the entity is not registered and was previously a registered agent; and
- had its registration terminated within the period of one year before the registered tax agent or BAS agent first employed/used the services of the entity.

4.40 The Bill ensures that this civil penalty will apply where a registered tax agent or BAS agent employs or uses the services of an entity (registered tax agent or nominee) whose registration was cancelled under the current law. [*Schedule 2, subitem 21(1)*]

Example 4.5

In May 2009, Toby is convicted under section 8N of the *Taxation Administration Act 1953* for recklessly making a false statement to a taxation officer, and, as a result, a state Board decides to cancel Toby's tax agent registration.

The TAS Act commences in January 2010.

Alistair, a registered tax agent, knowing the circumstances of the cancellation of Toby's registration, employs Toby in February 2010 to prepare his clients' business activity statements on his behalf.

Toby is taken to have been previously a registered tax agent under the TAS Act, and the cancellation of his registration is taken to have been a termination of registration under Part 4 of that Bill for the purposes of the civil penalty in section 50-25. As such, Alistair may be liable for a civil penalty under section 50-25 of the TAS Act, for employing Toby to provide tax agent services on his behalf when he knew that Toby's registration was cancelled within one year before he employed Toby.

4.41 Of note, the civil penalty does not apply where a registered tax agent or BAS agent employs or uses the services of an entity whose registration under the current law was cancelled because it ceased to carry on business as a registered tax agent. This is because the cancellation of registration did not result from misconduct by the entity. [*Schedule 2, subitem 21(2)*]

Review of decisions by the Administrative Appeals Tribunal

4.42 After commencement, despite the repeal of section 251QA of the current law (which lists the decisions of the state Boards that are reviewable by the AAT) applications may still be made to the AAT under that section for review of a decision by a state Board made before commencement under a provision of the current law, if, upon commencement, the period for making an application for review had not lapsed. [*Schedule 2, paragraph 18(1)(a)*]

4.43 The right to apply for review by the AAT allows those entities who have been affected by a decision of a state Board or the Board to question the Board's exercise of its powers before an independent administrative body. For the reviewable decisions listed in item 18 of Schedule 2 to the Bill, the Board is required by section 27A of the *Administrative Appeals Tribunal Act 1975* to give a notice to the affected entity/entities stating that a decision was made and that the entity has the right to have that decision reviewed. Under section 28 of that Act, the Board is required, upon request, to provide a written statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. A request for the review of a Board decision must be lodged directly with the AAT, generally by the twenty-eighth day after the day on which the terms of the decision are given to the affected person.

4.44 In addition, after commencement, an aggrieved entity may also continue to apply under section 251QA for the review of a decision of the Board where the Board is specifically empowered by this Bill to make a

decision under the current law. These decisions, further information for which can be found in Chapter 3, are:

- A decision by the Board to reject an application for registration or re-registration (under section 251JA or 251JC of the current law — requirements for registration).
- A decision by the Board to reject an application for registration or re-registration (under section 251KC of the current law — requirements for registration and re-registration as a nominee).
- A decision by the Board to refuse a request to allow an application for re-registration to be made at a later time (under section 251JB or 251KB of the current law — application for registration as a registered tax agent or nominee to be made at a later date).
- A decision by the Board to suspend or cancel the registration of an entity after investigating the entity in accordance with the TAS Act.

[Schedule 2, paragraphs 18(1)(b) to (h)]

4.45 Section 70-10 of the TAS Act sets out the decisions of the Board that may be reviewed by the AAT.

4.46 To avoid doubt, this Bill specifies that an application may be made under section 70-10 of the TAS Act for review of any of the following decisions of the Board:

- A decision under section 20-25 of the TAS Act, as applied by Schedule 2 to this Bill, to specify a condition to which registration is subject.
- A decision under section 20-30 of the TAS Act, as applied by Schedule 2 to this Bill, to require professional indemnity insurance to be maintained.
- A decision under subsection 60-125(4) of the TAS Act, as applied by Schedule 2 to the Bill, to extend the period of time within which an investigation is to be completed.

[Schedule 2, subitem 18(2)]

Transitional reporting and disclosure obligations of the Tax Practitioners Board

Annual reporting requirement for the first year

4.47 Under section 60-130 of the TAS Act, the Chair of the Board will be required to prepare an annual report on the operation of the Board to be given to the Minister for presentation to the Parliament. The Bill provides for modified reporting requirements in the first year of the Board's operation.

4.48 If commencement occurs during the last three months of a financial year (normally April, May or June), then, despite section 60-130, the Chair is not required to prepare a report for that financial year. Instead, the operation of the Board during the period from commencement to the end of that financial year will be documented in the annual report for the next financial year. *[Schedule 2, item 22]*

4.49 The preparation of an annual report is an important duty of the Board as it allows timely disclosure of information about the annual operation of the Board (and thereby enhances transparency and accountability). The modified reporting requirements provided in the Bill balance the value of timely disclosure with the competing priorities and significant workload that the Board will have during the first months following commencement.

Publication of information on the Internet

4.50 Section 60-135 of the TAS Act requires the Board to establish and maintain a register on the Internet of registered tax agents and BAS agents and entities that were previously a registered tax agent or BAS agent but whose registration was terminated (other than because they surrendered their registration or because of a reason prescribed in regulations).

4.51 The requirements of section 60-135 apply in relation to an entity if:

- the entity was a registered tax agent or registered nominee within the meaning of the current law; and
- in the period of 12 months before the commencement time, the entity's registration was cancelled under section 251K or 251KE of the current law (which outlines the reasons for cancellation or suspension of a tax agent's registration and the reasons for cancellation of registration of a nominee), other than because they permanently ceased to carry on a

business as a registered tax agent (as provided in paragraphs 251K(3C)(b) and 251K(4)(c) of the current law).

[Schedule 2, item 23]

4.52 Consistent with the TAS Act, this provision will facilitate compliance with the civil penalty for employing or using the services of a deregistered entity — refer to the explanatory memorandum to the Tax Agent Services Bill 2008 and to paragraphs 4.39 to 4.41.

Custody of Tax Agents' Boards' records and certain records in the custody of the Commissioner of Taxation

4.53 The records and documents that are in the custody of a state Board immediately before commencement or that relate to the activities of a state Board but are in the custody of the Commissioner before commencement must be transferred into the custody of the Board as soon as practicable after commencement. *[Schedule 2, item 24]*

4.54 This provision allows the Board to continue investigations under the new law in relation to inquiries that have reached the 'show cause notice' stage. The transfer of records will also give the Board access to information relating to pre-commencement conduct of registered tax agents, nominees or persons exempt from registration.

Regulations

4.55 The Governor-General may make regulations prescribing matters required or permitted by Schedule 2 to the Bill to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to Schedule 2 to the Bill. For example, regulations may be made in connection with the transfer of any records or documents of a state Board to the Board to ensure that the state Boards are able to transfer information and records held by them to the Board on commencement without being subject to objection from other parties. *[Schedule 2, subitem 26(1)]*

4.56 In particular, regulations may be made prescribing matters of a transitional nature, including saving provisions and application provisions, relating to the amendments or repeals made by Schedule 1 to the Bill. *[Schedule 2, subitem 26(2)]*

4.57 The general regulation-making power described in paragraph 4.55 is not limited by the particular regulations provided for and explained in paragraph 4.56. *[Schedule 2, subitem 26(3)]*

4.58 It is appropriate for certain matters to be dealt with by regulations rather than in the Bill itself because they are matters of technical or procedural detail which support the provisions in the Bill and do not themselves impose obligations on entities or impact significantly on individuals' rights and liberties.

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