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HOUSE OF REPRESENTATIVES

TAX AGENT SERVICES BILL 2008

EXPLANATORY MEMORANDUM

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

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
ATO	Australian Taxation Office
BAS	Business Activity Statement
Board	Tax Practitioners Board
CGT	capital gains tax
Code	Code of Professional Conduct
Commissioner	Commissioner of Taxation
Corporations Act	<i>Corporations Act 2001</i>
Criminal Code	<i>Criminal Code Act 1995</i>
Federal Court	Federal Court of Australia
FBT	fringe benefits tax
FMA Act	<i>Financial Management and Accountability Act 1997</i>
GST	goods and services tax
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
TAA 1953	<i>Taxation Administration Act 1953</i>
R&D	research and development
state Boards	state Tax Agents' Boards
the Minister	relevant Treasury Portfolio Minister

General outline and financial impact

Regulation of the provision of tax agent services

This Bill ensures that tax agent services are provided to the public in accordance with appropriate professional and ethical standards.

The key elements of the Bill are:

- the establishment of a national Tax Practitioners Board (Board) to replace the existing state-based boards;
- the registration and regulation of entities providing Business Activity Statement (BAS) services (ie, BAS agents) in addition to tax agents;
- a legislated Code of Professional Conduct (Code) to govern tax agents and BAS agents;
- a wider and more flexible range of disciplinary sanctions which may be imposed by the Board; and
- civil penalties and injunctions to replace criminal penalties for certain misconduct by agents and unregistered entities.

Date of effect: Most of the provisions in the Bill will commence on a single day to be fixed by Proclamation, within nine months of the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill receiving Royal Assent. Some of the provisions in the Bill (in particular those relating to the establishment of the Board) will commence on the day on which this Bill receives Royal Assent. These dates of effect are outlined in paragraphs 1.25 to 1.29 in Chapter 1 of this explanatory memorandum.

Proposal announced: These proposals were announced by the 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: The revenue impact of the measure is as follows:

- It is expected that the impact of replacing criminal penalties with civil penalties will result in a small gain to revenue. This gain is not expected to exceed \$1 million over four years.
- There is expected to be a cost 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: Transitional compliance costs of the measure 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.

Ongoing compliance costs of the measure are estimated to be:

- nil/minimal for tax agents; and
- small, at \$1 million per annum, for BAS agents (approximately \$67 each per annum).

Summary of regulation impact statement

Regulation impact on business

Impact: The Bill improves the regulatory environment for the provision of tax agent services for a fee or other reward by increasing the consistency in registration and providing appropriate, but flexible, regulation and greater certainty for agents.

Main points:

- The establishment of a national Board will benefit tax agents and BAS agents by providing nationally consistent regulation. It will enable the Board to allocate and use its resources more efficiently, and is expected to increase

certainty for agents in the way in which the legislation will be administered.

- Registration and regulation of tax agents and BAS agents, including the introduction of the enforceable Code, will provide certainty and clarity for agents as to what is expected of them, and is therefore expected to reduce compliance costs. BAS agents will face certain barriers to entry, but will benefit from the clarity provided by a move away from the partially regulated but unenforced arrangement in place currently. This will improve taxpayer confidence in the industry.
- The introduction of a wider range of more constructive and educative administrative sanctions which may be imposed by the Board will encourage agents to comply with the Code and will improve their performance.
- Replacement of criminal penalties with civil penalties and injunctions will benefit agents and the integrity of the tax system, by providing appropriate consequences for misconduct and by providing effective disincentives to act inappropriately.

Chapter 1

New legislative regime for the provision of tax agent services

Outline of chapter

1.1 This chapter outlines the background to the new legislative regime for the provision of tax agent services and the key elements of the regime.

1.2 Division 1 of Part 1 of this Bill provides for the short title and commencement of the Bill, the Bill's application to external territories and the general administration of the Bill.

1.3 Division 2 of Part 1 of this Bill provides for the object of the Bill and general guide to each Part of the Bill.

1.4 Division 3 of Part 1 and Division 80 of Part 8 of this Bill provide for the explanation of the use of defined terms and the rules for interpreting the Bill.

1.5 Section 70-55 of this Bill provides for the regulation-making power under the Bill.

Background to and key elements of the new legislative regime

Background

1.6 The current regime for regulating tax agents appears in Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936) and was originally introduced in 1943. Since then the tax environment has changed and a much larger proportion of taxpayers use tax agents to lodge their returns and help them comply with their tax obligations. In recent

years, approximately 74 per cent of individuals and over 95 per cent of businesses used a tax agent to prepare and lodge their tax returns.¹

1.7 The current regime includes:

- a registration process for tax agents and their nominees (but not Business Activity Statement (BAS) agents);
- provisions which provide that only tax agents are entitled to supply certain tax agent services for a fee;
- separate state Tax Agents' Boards (state Boards) responsible for registration of tax agents; and
- administrative penalties for taxpayers for making a false or misleading statement resulting in a shortfall amount, or for late lodgment, irrespective of whether they engaged a tax agent to prepare and/or lodge the document.

1.8 Broadly, the new legislative regime to govern the provision of tax agent services is intended to ensure that tax agent services and BAS services provided to the public are of an appropriate ethical and professional standard. The regime does so by:

- requiring providers of tax agent services and BAS services to be registered and to comply with a code of professional conduct; and
- establishing an independent national board to register tax agents and BAS agents, and to monitor and enforce compliance with those standards.

1.9 Although the new legislative regime was initially announced to commence on 1 July 1999, its introduction was delayed at the request of the tax profession, to allow practitioners to focus on preparing for the reforms introduced with *A New Tax System* from 1 July 2000. The Treasury has progressed the proposals to create the new legislative regime since mid-2002.

1.10 Confidential consultation on a detailed discussion paper occurred in 2005 and confidential consultation on draft legislation took

¹ Australian Taxation Office, *Compliance Program 2006-07*, Commonwealth of Australia (available at www.ato.gov.au), and as advised by the Australian Taxation Office in July 2008.

place with professional bodies representing tax agents and bookkeepers during 2006.

1.11 Draft legislation and explanatory materials were exposed for public comment for three months during mid-2007 and for four weeks in mid-2008.

1.12 The 2006-07 Budget contained additional funding to the Australian Taxation Office of \$57.5 million over four years for the implementation of the new legislative regime.

Key elements of the new legislative regime

1.13 The key elements of the new legislative regime are set out under the following subheadings.

The establishment of a national Tax Practitioners Board

1.14 The Tax Practitioners Board (Board) has responsibility for registering tax agents and BAS agents, ensuring that agents maintain appropriate skills and knowledge, investigating complaints against agents and ensuring that unregistered entities do not hold themselves out to be agents.

A wider scope of application

1.15 Under the new arrangements, BAS agents will be governed in the same way as tax agents, but will only be able to provide a limited range of services relating to the taxation laws relevant to a BAS provision in the law.

Registration requirements

1.16 Meeting the fit and proper person test, as well as minimum educational qualifications and relevant experience requirements, will be required in order to obtain registration to provide tax agent services for a fee or other reward. The minimum educational qualifications and relevant experience requirements are set at a less demanding level for registration as a BAS agent than for registration as a tax agent, in recognition of the narrower scope of services provided by BAS agents.

1.17 To allow for the registration of 'specialist' tax agents and BAS agents, the Board may impose conditions on registration. Conditions limit the scope of the services that an agent may provide to a single area of the taxation laws or a single type of tax agent service. These limitations correspond to the prescribed qualifications and relevant experience of an individual agent or, in the case of an agent that is a partnership or

company, to correspond to the prescribed qualifications and relevant experience of the individuals who work for the agent.

1.18 While registration is restricted to individuals, partnerships and companies, there is flexibility for a registered entity to conduct its business through a trust structure. The registered entity needs to be a trustee of the trust and must ensure that the work produced by the trust on behalf of the trustee is of a competent standard.

The introduction of a Code of Professional Conduct

1.19 A Code of Professional Conduct (Code) governs the ethical and professional standards of tax agents and BAS agents. The Code is set out as a statement of principles and the Board may issue binding written guidelines for the interpretation and application of the Code.

1.20 A formal legislated code has been a key aspect of the new legislative regime since it was first recommended in 1994 by the Report of the National Review of Standards for the Tax Profession, *Tax Services for the Public*. This report recommended that any such code should be made binding through legislation to enable the Board to impose sanctions for breaches and thereby to enforce compliance with the code.

A range of sanctions for breaches of the Code of Professional Conduct

1.21 Under the new arrangements, if a tax agent or BAS agent has breached the Code, the Board has a range of options. The Board may caution the agent, require the agent to complete a course of training, subject the agent to practising restrictions, require the agent to practise under supervision, or suspend or terminate the agent's registration. (Currently, the state Boards are only able to suspend or terminate registration.)

1.22 The Board may also apply to the Federal Court of Australia (Federal Court) for an order to pay a pecuniary penalty for certain serious misconduct, or seek an injunction to prevent an entity from engaging in, or compel an entity to undertake, certain conduct.

1.23 Such a wide range of sanctions allows the Board to tailor its response according to the severity of the misconduct.

Safe harbour from penalties

1.24 A taxpayer who uses a tax agent or BAS agent will benefit from a safe harbour from certain administrative penalties in certain circumstances. Penalties will no longer apply:

- where a false or misleading statement is made carelessly, provided the taxpayer has taken reasonable care to comply with their tax obligations by giving their tax agent or BAS agent the information necessary to make the statement; and
- where a document (such as a return, notice or statement) is not lodged on time in the approved form due to the tax agent's or BAS agent's carelessness, provided the taxpayer gave the agent the necessary information, in sufficient time, to lodge the document on time and in the approved form.

Detailed explanation of new law

Commencement of the Bill

1.25 Certain provisions in the Bill commence on the day on which the Bill receives Royal Assent, while others commence on a single day to be fixed by Proclamation. *[Section 1-5]*

1.26 The Proclamation date must be on or after the day on which the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill receives Royal Assent, but no later than nine months after that Bill receives Royal Assent. Otherwise, if no Proclamation is made, these provisions of the Bill commence on the first day after the end of that nine-month period. (If the provisions commence in this way, the relevant Treasury Portfolio Minister must make an announcement, by notice in the *Commonwealth of Australia Gazette*, of the day on which the provisions commenced.) *[Section 1-5]*

1.27 Broadly, the Board will need to be established as early as possible on or after Royal Assent and before the regulatory arrangements commence, to enable it to prepare for its role of registering tax agents and BAS agents and regulating compliance with the legislation. (This is detailed further in paragraphs 5.26 and 5.27 in Chapter 5 of this explanatory memorandum.) In order for the Board to be established from Royal Assent, certain other provisions in the Bill need to commence at the same time, such as the introduction to the Bill and the Dictionary and interpretation provisions.

1.28 The following provisions in the Bill commence on the day on which the Bill receives Royal Assent:

- Part 1, which provides the introduction to the Bill including the commencement provisions, application provisions and the general administration of the Bill, the object clause and explanation of the use of defined terms;
- sections 60-1 to 60-90, which provide for the establishment, functions and powers of the Board, the appointment of Board members, Board procedures and committees;
- sections 70-25 to 70-45, which are miscellaneous provisions relating to the Board, in particular immunity from legal action and delegation by the Board, and miscellaneous provisions relating to the protection of information obtained under the Bill (ie, the secrecy and disclosure provisions); and
- Part 8, which provides for the rules for interpreting the Bill and the Dictionary applicable to the Bill.

[Subsection 1-5(1), items 1, 3, 5 and 7 in the table]

1.29 The following provisions in the Bill commence on a single day to be fixed by Proclamation:

- Part 2, which provides for the eligibility and process for registration under the Bill;
- Part 3, which provides for the Code and the administrative sanctions applicable for failure to comply with the Code;
- Part 4, which provides for the grounds and process for terminating registration;
- Part 5, which provides for the civil penalties applicable for certain conduct;
- sections 60-95 to 70-20 and sections 70-50 to 70-55, which are:
 - the provisions relating to investigations conducted by the Board;
 - the provisions relating to the public reporting obligations of the Board; and

- miscellaneous provisions relating to applications by the Board to the Federal Court for injunctions, applications to the Administrative Appeals Tribunal for review of certain Board decisions, trustees and partnerships, legal professional privilege and the making of regulations by the Governor-General.

[Subsection 1-5(1), items 2, 4 and 6 in the table]

Application of the Bill

1.30 The Bill extends to every external Territory. *[Section 1-10]*

General administration

1.31 The Board has the ‘general administration’ of the Bill. As such, the Board has the power to do all things necessary in connection with the administration of the legislative regime to fulfil the purpose of the provisions in the Bill. *[Section 1-15]*

1.32 The Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill will amend subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) to include the Tax Agent Services Bill and regulations to be made under that Bill within the definition of ‘taxation law’.

1.33 While the Bill will form part of the taxation laws, the Board (and not the Commissioner of Taxation) has the general administration of the Bill.

Object of and general guide to the Bill

Object of the Bill

1.34 The object of the Bill is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct. This is achieved by (among other things):

- establishing the national Board to register tax agents and BAS agents;
- introducing the Code for tax agents and BAS agents; and

- providing for sanctions to discipline tax agents and BAS agents.

[Section 2-5]

General guide to each Part of the Bill

1.35 Part 2 of the Bill provides that an entity needs to be registered to provide tax agent services for a fee or to engage in other conduct connected with providing tax agent services. It sets out the requirements for registration. *[Subsection 2-10(1) and section 20-1]*

1.36 Part 3 of the Bill sets out the Code with which entities registered under the Bill must comply. *[Subsection 2-10(2) and section 30-1]*

1.37 Part 4 of the Bill sets out the circumstances in which an entity's registration can be terminated. *[Subsection 2-10(3) and section 40-1]*

1.38 Part 5 of the Bill provides for civil penalties aimed at ensuring compliance with the Bill. *[Subsection 2-10(4) and section 50-1]*

1.39 Part 6 of the Bill establishes the Board and sets out the Board's functions and powers. The Board may investigate breaches of the Bill and has certain reporting obligations. *[Subsection 2-10(5) and section 60-1]*

1.40 Part 7 of the Bill contains miscellaneous provisions, mainly administrative and machinery provisions relating to the operation of the Bill. *[Subsection 2-10(6) and section 70-1]*

1.41 Part 8 of the Bill contains the Dictionary, which lists most of the terms that are defined in the Bill and sets out the meaning of some important concepts and provides rules on how to interpret the Bill. *[Subsection 2-10(7)]*

Interpretation of the Bill

Explanation of the use of defined terms in the Bill

1.42 Many terms used in the Bill are defined in the Dictionary to the ITAA 1997, starting at section 995-1 in that Act. Therefore expressions in the Bill have the same meaning in the Bill as in the ITAA 1997 (other than the expression 'this Act'). Some terms used in the Bill are only defined in the Bill. *[Subsections 3-5(1) and 90-1(2)]*

1.43 Most terms that are defined in either the ITAA 1997 or in the Bill are identified by an asterisk at the start of the term, for example, 'BAS service'. *[Subsection 3-5(2)]*

1.44 In the following circumstances, a defined term is not identified by an asterisk:

- Once a defined term has been identified by an asterisk, later occurrences of the term in the same subsection are not usually asterisked [*subsection 3-10(1)*].
- Defined terms are not asterisked in the Guides, headings or notes in the Bill [*subsection 3-10(2)*].
- If a term used in the ITAA 1997 is used in the Bill and the term is not identified with an asterisk in the ITAA 1997, then the term is also not identified with an asterisk in the Bill. Refer to subsection 2-15(3) of the ITAA 1997 for expressions in that Act that are not identified with an asterisk [*subsection 3-10(4)*].
- Throughout the Bill, the term ‘Board’ is not identified with an asterisk because of the frequency with which the term appears in the Bill [*subsection 3-10(3)*].

Rules for interpreting the Bill

1.45 The following form part of the Bill:

- the headings to the Parts, Divisions and Subdivisions of the Bill;
- the Guides;
- the headings to the sections and subsections of the Bill; and
- the notes and examples that follow the provisions of the Bill.

[Subsection 80-1(1)]

1.46 Asterisks are used to identify defined terms. These asterisks form part of the Bill. However if a term is not identified by an asterisk, that fact should be disregarded in deciding whether or not to apply a definition or another interpretation provision to that term.

[Subsection 80-1(2)]

1.47 As mentioned above, Guides form part of the Bill. A Guide consists of sections under a heading indicating that what follows is a Guide to a particular Division, Subdivision, etc. [*Subsections 80-5(1) and 90-1(1)*]

1.48 Although forming part of the Bill, Guides are kept separate from the operative provisions in the Bill, and are usually presented in a box as the first provision in each Division. In interpreting an operative provision, a Guide may only be considered:

- in determining the purpose or object underlying the provision;
- to confirm that the provision's meaning is the ordinary meaning conveyed by its text taking into account its context in the Bill and the purpose or object underlying the provision;
- in determining the provision's meaning if the provision is ambiguous or obscure; or
- in determining the provision's meaning if the ordinary meaning conveyed by its text, taking into account its context in the Bill and the purpose or object underlying the provision, leads to a result that is manifestly absurd or is unreasonable.

[Subsection 80-5(2)]

Regulations

1.49 The Governor-General may make regulations prescribing matters that are required or permitted by the Bill or matters that are necessary or convenient to be prescribed for the purpose of carrying out or giving effect to the Bill. The regulations prescribed under this general regulation-making power are the proposed Tax Agent Services Regulations. *[Subsection 70-55(1)]*

1.50 The regulations are proposed to address matters such as:

- the details of the educational qualifications and relevant experience requirements for registration of an individual;
- the fees for application for registration; and
- the appointment and duties of the secretary to the Board.

1.51 Regulations may be made in relation to transitional matters relating to the enactment of the Bill and the repeal of Part VIIA of the ITAA 1936. *[Subsection 70-55(2)]*

1.52 It is appropriate for these 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.

Chapter 2

Registration of tax agents and BAS agents

Outline of chapter

- 2.1 Part 2 of this Bill provides for the requirements and process for registration as a tax agent or Business Activity Statement (BAS) agent. Sections 90-5 and 90-10 provide for the meanings of ‘tax agent service’ and ‘BAS service’.
- 2.2 Subdivision 30-C of Part 3 of the Bill provides for the obligation for tax agents and BAS agents to notify the Tax Practitioners Board (Board) of a change in circumstances.
- 2.3 Part 4 of the Bill provides for the grounds for termination of registration, and notice and effect of termination of registration.
- 2.4 Subdivision 70-B of Part 7 of the Bill provides that registration and termination of registration decisions of the Board are reviewable by the Administrative Appeals Tribunal (AAT).

Context of amendments

Operation of current provisions

Definitions of tax agent service and BAS service

2.5 The current law does not define ‘tax agent service’. Subsection 251L(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) contains a list of services for which unregistered entities are prohibited from charging a fee. Subsection 251L(6) states that certain specified unregistered individuals may provide a BAS service for a fee. (The definition of ‘BAS service’ is given in subsection 251L(7).)

Registration of tax agents

2.6 Divisions 3 and 4 of Part VIIA of the ITAA 1936 specify the requirements (and process) for registration as a tax agent or as a nominee of a tax agent. For an individual, the registration requirement is that the individual must be a fit and proper person to prepare income tax returns

and transact business on behalf of taxpayers in income tax matters, and must not be an undischarged bankrupt.

2.7 Under section 251BC of the ITAA 1936, a person is not a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers in income tax matters if they do not hold the prescribed qualifications, are not a natural person, are not above 18 years of age, are not of good fame, integrity and character, have been convicted of a serious taxation offence during the previous five years or are under a sentence of imprisonment for a serious taxation offence.

2.8 However, individuals who were registered as a tax agent or nominee immediately before 1 November 1988 can be fit and proper persons without holding the prescribed qualifications.

2.9 Currently, there is no separate registration requirement for the provision of a BAS service for a fee, although there are restrictions on who, other than tax agents, can provide those services. Under subsection 251L(6) of the ITAA 1936, an unregistered individual may provide a BAS service (as defined under subsection 251L(7)) for a fee in limited circumstances, for example, if they are a member of a recognised professional association, or if they are a bookkeeper working under the direction of a tax agent.

Suspension or cancellation of registration

2.10 Section 251K of the ITAA 1936 specifies the grounds on which the current state Tax Agents' Boards (state Boards) must or may suspend or cancel a tax agent's or nominee's registration, including where the agent or nominee is convicted of certain offences, ceases to meet the registration requirements or is guilty of certain misconduct.

Rationale for major changes

Definitions of tax agent service and BAS service

2.11 The Bill contains positive principled definitions of 'tax agent service' and 'BAS service' to ensure that the scope of the services being regulated is clear and sufficiently flexible to include newly emerging services as the tax system evolves.

Registration of BAS agents

2.12 The scope of registration has been widened to include BAS agents in order to ensure the appropriate ethical and professional standards of entities providing BAS services, in recognition of the important role such entities play in the tax system.

Termination of registration

2.13 For clarity, the Bill separates the grounds for termination of registration into:

- ceasing to meet the registration requirements, breaching registration conditions or surrendering registration (which are dealt with under Part 4); and
- breaching a provision of the Code of Professional Conduct (Code) (which is dealt with under Part 3 — refer to Chapter 3 of this explanatory memorandum).

Summary of new law

Definitions of tax agent service and BAS service

2.14 To provide a tax agent service or a BAS service for a fee or other reward, an entity must be registered, otherwise the entity may contravene a civil penalty provision. (The requirement to register and the civil penalties that may apply in cases of contravention of a civil penalty provision are explained in Chapter 4 of this explanatory memorandum.)

2.15 A ***tax agent service*** is any service that relates to:

- ascertaining or advising about the liabilities, obligations or entitlements of an entity under a taxation law; or
- representing an entity in their dealings with the Commissioner of Taxation (Commissioner) and,

that is provided in circumstances where it is reasonable to expect that the entity will rely on it to satisfy liabilities or obligations under a taxation law or to claim entitlements under a taxation law.

2.16 ***Taxation law*** is defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) to mean an Act (including a part of an Act) of which the Commissioner has the general administration, or regulations under such an Act. Note that the scope of the taxation laws will be broadened to include the Bill and the regulations under the Bill — refer to paragraphs 1.32 and 1.33 in Chapter 1 of this explanatory memorandum.

2.17 A **BAS service** is any service that relates to:

- ascertaining or advising about the liabilities, obligations or entitlements of an entity under a BAS provision; or
- representing an entity in their dealings with the Commissioner relating to a BAS provision,

that is provided in circumstances where it is reasonable to expect that the entity will rely on it to satisfy liabilities or obligations under a BAS provision or to claim entitlements under a BAS provision.

2.18 **BAS provisions** is defined in section 995-1 of the ITAA 1997 to mean:

- collection and recovery of tax provisions in Part VII to the *Fringe Benefits Tax Assessment Act 1986*;
- the indirect tax law (which means the goods and services tax (GST) law, the wine tax law, the luxury car tax law or the fuel tax law, as defined in section 995-1 of the ITAA 1997); and
- Parts 2-5 and 2-10 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) (the pay as you go system).

2.19 As 'taxation law' includes 'BAS provisions', by definition 'tax agent services' include 'BAS services'.

Registration

2.20 Individuals (including those acting in the capacity of a trustee), partnerships and companies (including those acting in the capacity of a trustee) may apply to the Board for registration as a tax agent or BAS agent. The Board must grant registration where all eligibility requirements have been satisfied.

2.21 To be eligible for registration, an entity must satisfy the Board that it has met the registration requirements, which broadly consist of the following two elements:

- a fit and proper person test; and
- prescribed qualifications and experience requirements (for individuals), or the requirement to have a sufficient number

of individuals who are registered (for companies and partnerships).

2.22 The Bill preserves the special registration criteria for individuals who were registered either as a tax agent or a nominee immediately before 1 November 1988 (pre-1988 tax agents or nominees). Pre-1988 tax agents or nominees who were also registered immediately before the commencement of all of the provisions of the Bill are eligible for registration without satisfying the prescribed qualifications and experience requirements under the Bill. The Board must register pre-1988 tax agents or nominees as tax agents provided that the Board is satisfied that they comply with the other registration requirements.

2.23 The Board has a period of six months from receiving an application for registration in which to decide whether to grant or refuse registration. If the Board has not made a decision within this six-month period, the Board is taken to have rejected the application. This time limit provides certainty and finality for entities seeking to be registered and allows an entity who has not been granted registration to have their application reviewed by the AAT — refer to paragraphs 2.66 to 2.68 for further information about AAT review of Board decisions.

2.24 The Board may impose or vary a condition of registration. Any such condition limits the tax agent services that an agent may provide to an area of the taxation laws or a type of service for which:

- in the case of an individual, the agent has the prescribed qualifications and relevant experience; or
- in the case of a partnership or company agent, the registered individuals who work for the agent have the prescribed qualifications and relevant experience.

Termination of registration

2.25 The Board has discretion to terminate the registration of a tax agent or BAS agent if:

- it no longer meets the registration requirements;
- it breaches a condition of registration; or
- if it is an individual or a company — an event affecting continued registration happens to the agent.

- 2.26 The Board must terminate registration:
- upon the death or dissolution of a tax agent or BAS agent; or
 - when an agent surrenders their registration.

2.27 The majority of the decisions of the Board under Parts 2 and 4 of the Bill are reviewable by the AAT.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A tax agent service is any service that relates to ascertaining or advising about the liabilities, obligations or entitlements of an entity under a taxation law, or representing an entity in their dealings with the Commissioner, provided in circumstances where it is reasonable to expect that the entity will rely on it to satisfy liabilities or obligations, or to claim entitlements, under a taxation law.	There is a list of services, including preparing or lodging a return on behalf of a taxpayer, or giving advice about a taxation law, for which an unregistered person or partnership is prohibited from charging a fee.
A BAS service is any service that relates to ascertaining or advising about the liabilities, obligations or entitlements of an entity under a BAS provision, or representing an entity in their dealings with the Commissioner in relation to a BAS provision, provided in circumstances where it is reasonable to expect that the entity will rely on it to satisfy liabilities or obligations, or to claim entitlements, under a BAS provision.	The definition of BAS service contains a list of services for which unregistered individuals may charge a fee in limited circumstances, including preparing or lodging a BAS on behalf of a taxpayer, or giving advice about a BAS provision.
The prescribed minimum educational qualifications and relevant experience requirements, as well as the fit and proper person test, must be met to be registered as a tax agent or BAS agent.	No equivalent requirement for BAS agent registration. Unregistered individuals can provide a BAS service for a fee under limited circumstances — for example, if they are a member of a recognised professional association or if they are a bookkeeper working under the direction of a tax agent.

<i>New law</i>	<i>Current law</i>
An application for registration must be decided by the Board within six months of its receipt.	No requirement for the state Boards to make a decision to register a tax agent or a nominee of a tax agent within a specified time.
A change in the composition of the partnership does not affect the continuity of the partnership. However, a partnership must notify the Board of any change in the composition of the partnership, or if an event affecting continued registration happens in respect of a partner in the partnership. Where a partnership fails to notify the Board of any change in the composition of the partnership, the partnership exposes itself to a sanction for a breach of the Code.	Where a partnership is registered as a tax agent and there is a change in the constitution of the partnership, registration is taken to be terminated from the time of that change. However, where the registration of a partnership has been terminated, there is a mechanism in which former partners of the original partnership can be registered as a successor to the original partnership, either as an individual or a partner in a new partnership.
There is no registration requirement setting percentages of directors to be qualified. To be registered, companies must be able to demonstrate that they have a sufficient number of registered individuals to provide tax agent services or BAS services to a competent standard, and to carry out supervisory arrangements.	The registration requirements for companies include that qualified director/s must have at least 25 per cent ownership of the company. Each qualified director must be a fit and proper person (including holding the prescribed qualifications).

Detailed explanation of new law

Definitions of tax agent service and BAS service

Definition of tax agent service

2.28 A **tax agent service** is any service that relates to:

- ascertaining the liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law;
- advising an entity about the liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or

- representing an entity in their dealings with the Commissioner and,

that is provided in circumstances where it can reasonably be expected that the entity will rely on it to satisfy liabilities or obligations that arise or could arise under a taxation law, or to claim entitlements that arise or could arise under a taxation law. [*Subsections 90-5(1) and 90-1(1)*]

2.29 A tax agent service includes, but is not limited to:

- preparing or lodging a return, notice, statement, application or other document about a taxpayer's liabilities, obligations or entitlements under a taxation law;
- preparing or lodging on behalf of a taxpayer an objection under Part IVC of the TAA 1953 against an assessment, determination, notice or decision under a taxation law;
- applying to the Commissioner or the AAT for a review of, or instituting an appeal against, a decision on an objection under Part IVC of the TAA 1953;
- giving a taxpayer advice about a taxation law that the taxpayer can reasonably be expected to rely upon to satisfy their taxation obligations; or
- dealing with the Commissioner on behalf of a taxpayer.

2.30 A tax agent service relates to services provided under a taxation law. A **taxation law** has the same meaning as in subsection 995-1(1) of the ITAA 1997, namely, any Act (including a part of an Act) which the Commissioner has the general power to administer, and any regulations under such an Act. (Note that the scope of 'taxation law' will be broadened to include this Bill and the regulations under the Bill — refer to paragraph 1.32 in Chapter 1 of this explanatory memorandum.) Consequently, the new provisions extend the concept of 'tax agent services' beyond income tax matters.

2.31 Tax agent services only include those services that involve the application or interpretation of a taxation law (and therefore require the provider to have a certain level of knowledge and experience in the taxation laws), and those services which involve representing an entity in their dealings with the Commissioner. For example, advising or assisting an entity on tax concessions for expenditure incurred on research and development (R&D) activities are tax agent services, where the service involves the application of the taxation laws.

Example 2.1

Lorenzo describes himself as an ‘R&D consultant’. Lorenzo assists his clients to identify which of the activities undertaken by them will meet the definition of ‘R&D activities’, for the purpose of assisting them in making claims under the R&D tax concession provisions in the ITAA 1936.

Lorenzo advises his clients on which activities are eligible, and helps them to prepare their registration forms to be lodged with Innovation Australia, in respect of these activities. This registration form includes a description of the eligible R&D activities and the technical objectives of those activities, as well as a break up of the expenditure claimable in respect of those activities. Registration with Innovation Australia is a pre-requisite to making a claim for the expenditure on those activities under the R&D tax concession.

The work performed by Lorenzo falls within the definition of ‘tax agent service’ as the service provided and advice given relate to the ascertaining of clients’ entitlements under the R&D tax concession provisions in the ITAA 1936 and the services are provided in circumstances in which Lorenzo’s clients could reasonably be expected to rely on them to claim the entitlement.

Example 2.2

Jessica is a quantity surveyor who provides reports that detail depreciable items in a building to enable her clients to calculate deductions for decline in the values of depreciating assets.

Jessica is providing a tax agent service as she would need to have certain knowledge of the relevant taxation laws to determine the depreciable nature of the assets to provide the service and it is reasonable to expect her clients to rely on the service to claim an entitlement under the taxation laws.

2.32 The definition of ‘tax agent service’ does not include services that do not involve the interpretation and/or application of the taxation laws.

Example 2.3

Tom is an asset valuer and provides opinions on the value of assets.

Tom often assists clients in determining the market value of assets for tax purposes. There are many provisions in the taxation laws where the tax position depends upon the value of an asset or transaction, for example, ascertaining the tax consequences of non-arm’s length transactions.

Tom would not ordinarily be providing a tax agent service as the provision of this service does not normally involve the interpretation and/or application of the taxation laws to ascertain clients' tax positions.

2.33 The definition of 'tax agent service' does not include services provided in circumstances where it is not reasonable to expect that they would be relied upon to satisfy liabilities or obligations under a taxation law, or to claim entitlements under a taxation law.

Example 2.4

Tanto Ltd is a car dealer. While selling cars, Tanto Ltd often gives its clients suggestions on the tax implications of car purchase transactions, but includes with its advice that because it is not a tax expert, clients should consult their tax agent. Because Tanto Ltd does not hold itself out as a tax advisor or as having expertise in tax, and, further, caveats its advice, it is not reasonable to expect the tax advice provided by Tanto Ltd to be relied upon by its clients for the purpose of satisfying their liabilities or obligations under a taxation law, or claiming entitlements under a taxation law. As such, the tax advice provided by Tanto Ltd is not a tax agent service.

2.34 Most tax related services that tax agents or BAS agents outsource to an unregistered entity would not be tax agent services. This could be because the service does not involve the interpretation or application of the taxation laws, or because the relationship between the agent and the contractor is such that it is not reasonable to expect the agent to rely on the service provided by the contractor to satisfy its clients' tax obligations or to claim entitlements under the taxation laws.

Example 2.5

Ace Accounting is a partnership which is registered as a tax agent. Acme Services Trust provides professional and administrative support personnel to Ace Accounting. The personnel supplied remain employees of Acme Services Trust, and as such, they are Ace Accounting's contractors.

Ace Accounting instructs and directs the contractors, and provides the relevant steps and review processes that the contractors must adhere to. Ace Accounting specifies in its engagement letters with clients that it may use contractors or other entities to deliver contracted services with their authorisation, but that it is responsible for the conduct and activities of all persons that it uses in delivering the contracted services.

In these circumstances, the services provided by the contractors are not tax agent services because it is not reasonable to expect that Ace Accounting would rely on the services to satisfy its clients' liabilities or obligations, or claim entitlements, under a taxation law.

2.35 If tax agents or BAS agents contract a tax expert to provide specialised tax advice in an area that they are not familiar with and therefore cannot review for accuracy, the tax advice would normally be a tax agent service.

Example 2.6

Joe is a registered tax agent who sometimes contracts the services of Wilma, a specialised tax agent who has particular expertise in the area of capital gains tax (CGT).

In this case, Wilma, in providing the specialised CGT services, is providing a tax agent service to Joe, as it is reasonable to expect that Joe would rely on the services provided by Wilma to satisfy his clients' obligations under the taxation laws.

2.36 Where it is reasonable to expect that advice is to be relied upon for purposes other than to satisfy tax obligations (eg, for the preparation and lodgment of a return), such as making an informed financial or business decision, assessing risks or determining income tax provisions in an audited account, the advice is not a tax agent service. This applies to, for example, certain advice provided by a financial services licensee under the *Corporations Act 2001* (Corporations Act) on the tax implications of financial products or financial transactions, or advice relating to ascertaining tax liabilities for the purpose of calculating a future income stream. It would also include advice provided by an actuary on a risk assessment of a particular product or entity that takes into account the tax implications.

Example 2.7

Angelia is licensed under the Corporations Act to provide a range of financial services. In accordance with the scope of her financial services licence, Angelia recommends to her client, Adam, a gearing strategy as a way to accumulate wealth over the long term. In determining whether Adam has the cash flow to afford the interest costs on borrowed funds, Angelia estimates Adam's cash flow taking into account the potential tax deductibility of interest costs, the taxable nature of the dividends, the impact of franking credits on Adam's income tax position and his eligibility for certain tax offsets.

Merely taking into account the tax consequence of Adam's circumstances in estimating his future cash flow does not constitute a tax agent service. This is incidental to the financial advice being

provided and it is reasonable to expect that the advice would only be relied upon by Adam for the purpose of deciding whether to adopt the recommended financial strategy.

Example 2.8

Erica is licensed under the Corporations Act to provide a range of financial services. Caroline seeks financial advice from Erica regarding long-term wealth accumulation and an appropriate asset allocation.

Erica assesses Caroline's risk profile and recommends an asset allocation that is consistent with that profile. As part of this process, Erica recommends that Caroline sells some of her existing shares and uses the proceeds for investment in managed funds to increase diversification of her investments. In assessing which shares Caroline should sell, Erica alerts Caroline to the fact that selling certain shares could potentially raise CGT liabilities. This would not ordinarily be a tax agent service because it is provided for the purpose of advising Caroline about an appropriate asset allocation that fits her risk profile. However, if, while alerting Caroline to the CGT consequences of selling particular shares, Erica also assures Caroline that the tax advice she provides is accurate and can be relied upon without further consulting a tax agent, then Erica would be providing a tax agent service.

Example 2.9

Oliver & partners is an audit firm and a registered company auditor under the Corporations Act. As part of its audit work, Oliver & partners is required to calculate income tax provisions to be included in its clients' audited accounts.

Oliver & partners is not providing a tax agent service as it is reasonable to expect that its clients' would only rely on the service to satisfy the statutory requirements for their audited accounts.

Example 2.10

Norma is licensed under the Corporations Act to provide a range of financial services. In addition to providing advice about the tax implications of decisions about financial products, Norma provides extensive analysis of her clients' tax positions and details of the relevant entries into her clients' tax returns that would result from adopting certain financial product decisions.

She includes a disclaimer in her product disclosure statement stating that the tax advice she provides cannot be relied upon for the purpose of satisfying obligations or claiming entitlements under the taxation laws. Despite the disclaimer, because the advice is extensive and sufficiently detailed to be able to be reflected in her clients' tax returns,

it is reasonable to expect her clients to rely on the advice to satisfy their obligations under the taxation laws. As such, Norma is providing a tax agent service.

2.37 Given the broad definition of a ‘taxation law’, a regulation-making power is provided in the Bill to give the Parliament the flexibility in the future to specify particular services that do not fall within the definition of ‘tax agent service’. A similar power is provided in relation to the definition of ‘BAS service’. [Subsections 90-5(2) and 90-10(2)]

Definition of BAS service

2.38 A ***BAS service*** is a type of tax agent service. It is a tax agent service that relates:

- particularly to ascertaining the liabilities, obligations or entitlements of an entity that arise, or could arise in the future, under a BAS provision;
- particularly to advising an entity about the liabilities, obligations or entitlements of the entity or another entity that arise, or could arise in the future, under a BAS provision; or
- to representing an entity in their dealings with the Commissioner relating to a BAS provision and,

that is provided in circumstances where it can reasonably be expected that the entity will rely on it for the purpose of satisfying liabilities or obligations that arise, or could arise, under a BAS provision, or to claim entitlements that arise, or could arise, under a BAS provision.

[Subsections 90-10(1) and 90-1(1)]

2.39 A BAS provision is any one of the provisions defined as ***BAS provisions*** in section 995-1 of the ITAA 1997. This means:

- collection and recovery of tax provisions in Part VII to the *Fringe Benefits Tax Assessment Act 1986*;
- the indirect tax law (which means the GST law, the wine tax law, the luxury car tax law or the fuel tax law, all as defined in section 995-1 of the ITAA 1997); and
- pay as you go withholding and instalments provisions in Parts 2-5 and 2-10 of Schedule 1 to the TAA 1953.

- 2.40 A BAS service therefore includes:
- preparing or lodging an approved form about a taxpayer's liabilities, obligations or entitlements under a BAS provision;
 - giving a taxpayer advice about a BAS provision that the taxpayer can reasonably be expected to rely upon to satisfy their taxation obligations; or
 - dealing with the Commissioner on behalf of a taxpayer in relation to a BAS provision.

2.41 As with tax agent services, BAS services only include those services that involve the application or interpretation of a BAS provision (and therefore require a certain level of experience and knowledge of BAS provisions), and those services which involve representing an entity in their dealings with the Commissioner in relation to a BAS provision. Administrative duties such as entering data, paying tax and record-keeping are not BAS services.

Example 2.11

Leonard provides classroom and onsite training about the installation/configuration and the use of off-the-shelf accounting software including the use of the software to determine liabilities under a BAS provision. The training he provides is of a general nature. Leonard does not provide specific advice about his clients' liabilities nor does he help to establish appropriate default codes for GST purposes in the accounting software.

Leonard is not providing a BAS service because he is not interpreting a BAS provision and is not providing advice to his clients about their liabilities under a BAS provision in a circumstance where it can reasonably be expected to be relied upon by them to satisfy their liabilities or obligations under a BAS provision, or to claim entitlements under a BAS provision.

If, however, Leonard helps his clients to determine the appropriate default GST codes for certain transactions when configuring the accounting software, then he is providing a BAS service as the provision of advice regarding which GST codes are to be used requires Leonard to interpret and apply a BAS provision and therefore have a certain level of knowledge of the GST law.

2.42 Not all items of work from the recording of a transaction to the preparation of an approved form (eg, a BAS) are BAS services. Entering data, coding transactions based on instructions provided and processing payments or preparing bank reconciliations are not BAS services because they do not require the interpretation or application of a BAS provision.

Example 2.12

Francisca is a bookkeeper. She follows instructions from Chris, a registered BAS agent, in coding tax invoices and transferring data onto a computer programme for her clients. Francisca's work is then reviewed by Chris to check its accuracy. The tasks that Francisca is performing do not constitute BAS services.

Example 2.13

Penny operates a mobile bookkeeping service for a number of clients. The services she provides include setting up commercial accounting software for clients, entering and coding clients' transactions into these software programmes and generating a variety of reports (including those that assist clients in determining their BAS liabilities) from these software programmes.

Penny's clients rely on the information she provides to complete their regular BASs. They do not expect to have to re-work reports and are paying Penny to provide a service that allows them to complete the BAS with the information she provides. While installation and configuration of accounting software (without determining the default GST codes) does not constitute a BAS service, the coding of clients' transactions in this situation, where clients do not expect to have to re-work the reports generated, constitutes the provision of a BAS service as it requires the interpretation and application of a BAS provision where the service can be expected to be relied upon by clients for the purpose of satisfying obligations under a BAS provision.

Registration

Registration requirements

2.43 Individuals who are aged 18 or over (including those acting in the capacity of a trustee), partnerships and companies (including those acting in the capacity of a trustee) are eligible for registration as a tax agent or BAS agent if the Board is satisfied that they meet the tax practitioner registration requirements. While trustees can apply for registration, trusts are not entities that can apply for registration.

[Subsection 90-1(1) and sections 20-5 and 70-15]

Example 2.14

Amy, Betty and Cathy are trustees of ABC Trust and only Amy is a registered tax agent. While ABC Trust is not eligible for registration as a tax agent and therefore cannot provide tax agent services for a fee in its own right, ABC Trust can provide tax agent services for a fee on Amy's behalf provided that Amy ensures that the services provided by ABC Trust are provided competently.

2.44 The registration requirements consist of the following two elements:

- the fit and proper person test (which applies to individuals and partners/directors of partnerships/companies); and
- prescribed qualifications and experience requirements for individuals, or having a sufficient number of registered individuals (thereby demonstrating appropriate organisational qualifications and experience) for partnerships/companies.

[Section 20-5]

Element 1: Fit and proper person test

2.45 To be eligible for registration, the Board must be satisfied that an applicant is a fit and proper person. The fit and proper person requirement applies to individuals, each individual partner (for partnerships) and each director of a company (for partnerships/companies). *[Paragraphs 20-5(1)(a) and 20-5(3)(a) and subparagraphs 20-5(2)(a)(ii) and 20-5(2)(b)(i)]*

2.46 The Board, in deciding whether an individual is a fit and proper person, must have regard to whether the individual is of good fame, integrity and character and, in particular, but without limiting those characteristics, whether an event affecting the individual's continued registration happened to the individual in the past five years, whether the individual had the status of an undischarged bankrupt at any time during the previous five years, and whether the individual had served any part of a term of imprisonment during the previous five years. *[Section 20-15]*

2.47 An event affecting an entity's continued registration occurs if the entity:

- is convicted of a serious taxation offence;
- is convicted of an offence involving fraud or dishonesty;
- is penalised for being a promoter of a tax exploitation scheme (under subsection 290-50(1) of Schedule 1 to the TAA 1953);
- is penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling (under subsection 290-50(2) of Schedule 1 to the TAA 1953);

- becomes an undischarged bankrupt or goes into external administration (as defined in the Corporations Act); and/or
- is sentenced to a term of imprisonment.

[Section 20-45]

Example 2.15

Three years ago, Melissa was convicted of dangerous driving causing serious injury under section 319 of the *Crimes Act 1958* (Vic) and received a two-year suspended prison sentence. Being sentenced to a term of imprisonment in the previous five years is an event that the Board must consider in deciding whether Melissa is a fit and proper person for registration purposes.

Example 2.16

Seven years ago, William became bankrupt and was not discharged until three years ago. Although William became bankrupt more than five years ago, having the status of an undischarged bankrupt at any time during the past five years is a factor that the Board must consider in deciding whether William is a fit and proper person for registration purposes.

2.48 Broadly speaking, a serious taxation offence is a certain type of taxation offence or any one of a series of specified offences outlined in the Schedule to the *Criminal Code Act 1995* (Criminal Code) that relates to a tax liability, as described below. [Subsection 90-1(1)]

2.49 A **taxation offence** is defined in section 8A of the TAA 1953 as an offence against any taxation law. A ‘serious taxation offence’ is an offence that is a ‘taxation offence’ that is punishable on conviction by a fine exceeding 40 penalty units, or imprisonment, or both. [Subsection 90-1(1)]

Example 2.17

Fernando maintains a bank account in a false name and omits the interest from his income tax return. If convicted, the offence is punishable by a fine of up to 50 penalty units. This is a serious taxation offence, irrespective of the penalty actually imposed by the court upon conviction.

2.50 A ‘serious taxation offence’ also refers to those offences outlined in the Criminal Code which relate to:

- obtaining property by deception (section 134.1 of the Criminal Code);

- obtaining financial advantage by deception (section 134.2 of the Criminal Code);
- general dishonesty with respect to obtaining a gain, causing a loss or influencing a Commonwealth public official (section 135.1 of the Criminal Code);
- obtaining a financial advantage (section 135.2 of the Criminal Code); and/or
- conspiracy to defraud with respect to obtaining a gain, causing a loss or influencing a Commonwealth public official (section 135.4 of the Criminal Code),

if the offence relates to a tax liability within the meaning of the TAA 1953. [Subsection 90-1(1)]

2.51 An event affecting an entity's continued registration includes conviction of an offence involving fraud or dishonesty. The offence of dishonesty takes its ordinary meaning. Under section 130.3 of the Criminal Code, *dishonest* is defined as dishonest according to the standards of ordinary people in circumstances where the defendant is aware of these standards. Consequently, the scope of 'dishonest' is determined by community standards.

Example 2.18

Patricia was convicted of theft and was fined \$1,500. To convict an individual for theft, a court must find that the individual has dishonestly appropriated property belonging to another with the intention of permanently depriving the other person of the property. Consequently, theft is an offence of dishonesty and the Board must consider this in determining whether Patricia satisfies the fit and proper person test for registration.

2.52 In addition to the fit and proper person requirements for individuals, the following requirements apply to partnerships and companies (including companies which are partners in a partnership seeking registration), as appropriate:

- each partner who is an individual must be aged 18 years or more;
- the company must not be under external administration; and

- the company must not have been convicted of a ‘serious taxation offence’ or an offence involving fraud or dishonesty during the previous five years.

[Subparagraphs 20-5(2)(a)(i), 20-5(2)(b)(ii) and (iii) and paragraphs 20-5(3)(b) and (c)]

Element 2: Prescribed qualifications and experience

Prescribed qualifications and experience (for individuals)

2.53 An individual is required to satisfy the prescribed requirements in order to register. The requirements prescribed in the regulations include minimum educational qualifications and relevant experience.

[Paragraph 20-5(1)(b)]

2.54 The regulations may provide a system to allow the Board to accredit professional associations, including tax and accounting professional associations, associations of bookkeepers and legal professional associations, for the purpose of recognising professional qualifications and experience for registration purposes. *[Section 20-10]*

Sufficient number of registered individuals (for companies/partnerships)

2.55 In order to be registered, companies and partnerships must satisfy the Board that they have a sufficient number of registered individuals to provide services to a competent standard and to carry out necessary supervisory arrangements, as follows:

- in the case of registration as a tax agent, such registered individuals must be registered as tax agents; and
- in the case of registration as a BAS agent, such registered individuals must be registered as BAS agents or tax agents.

[Paragraphs 20-5(2)(c) and 20-5(3)(d)]

2.56 This requirement ensures that a company or a partnership has sufficient organisational qualifications and experience to provide tax agent services or BAS services competently. The registered individuals that a company or partnership are required to have in order to satisfy this requirement may include partners, directors, employees, contractors and staff provided under service trust arrangements.

Example 2.19

NXW Ltd applies to the Board for registration as a tax agent. To satisfy the Board that it has a sufficient number of individuals who are registered tax agents to ensure that the tax agent services it provides are provided competently and that provision of services is

appropriately supervised, NXW Ltd lists in its application for registration both its employees who are registered tax agents and the registered individuals supplied by JMD Trust (a service trust).

2.57 There is no set formula for determining the number of registered individuals that a company or partnership is required to have to satisfy this requirement. The Board may provide further guidance on adequate staffing and supervision from time to time. The factors that the Board may take into account in providing such guidance may include the size of the business, the services being offered, the conditions that may be imposed on the company/partnership's registration (based on the qualifications and experience of its personnel — refer to paragraph 2.69 for the Board's ability to impose conditions on an entity's registration) and the supervisory arrangements (eg, quality control practices) in place.

Pre-1988 tax agents and nominees

2.58 Individuals who were registered as a tax agent or a nominee under Part VIIA of the ITAA 1936 immediately before the commencement of section 39 of the *Taxation Laws Amendment Act (No. 2) 1988* on 1 November 1988 and remain registered immediately prior to commencement of all of the provisions of the Bill are eligible for registration as tax agents even if they do not meet the prescribed educational qualifications and relevant experience requirements for registration. (They must, however, meet the other registration requirements.) This rule governing pre-1988 tax agents and nominees preserves the special treatment provided in the current law.
[Subsection 20-5(4)]

Registration process

Application for registration

2.59 Individuals, partnerships or companies may apply to the Board for registration, including renewal of registration, as a tax agent or BAS agent. *[Subsection 20-20(1)]*

2.60 An application for registration must be in the form approved by the Board, accompanied by the prescribed application fee and any documents that are required by the Board. *[Subsection 20-20(2)]*

2.61 The Board must give the application fee to the Commissioner who receives the fee on behalf of the Commonwealth. If the applicant decides to withdraw an application for registration, the application fee will be refunded if the withdrawal occurs within 30 days after the day on which the application was made and before the application has been granted or refused. *[Subsections 20-20(3) and (4)]*

Decision by the Board to register the applicant

2.62 If the Board is satisfied that the applicant meets all of the registration requirements, the Board must grant registration. Otherwise, the Board must reject the application for registration. *[Subsection 20-25(1)]*

2.63 The Board has a period of six months from receiving an application for registration in which to decide whether to grant or refuse registration. Where the Board has not made a decision on a registration application within six months of receiving the application, the Board is taken to have rejected the application unless the rules for renewal of registration apply. *[Subsections 20-25(2) and (3)]*

2.64 Under the rules for renewal of registration, if a tax agent or BAS agent applies for renewal at least 30 days prior to the expiration of registration, or such shorter period as the Board allows, the agent's registration is taken to continue until their application has been decided. *[Subsections 20-50(1) and (2)]*

2.65 An entity whose registration has been suspended may apply for renewal of registration during the period of suspension. *[Subsection 20-50(3)]*

2.66 Both the Board's decision to reject an application for registration and its deemed decision to reject an application as a result of its failure to determine an application within six months of receiving the application are reviewable decisions, for which the applicant can make an application to the AAT. *[Subparagraph 70-10(a)(i)]*

2.67 The right to apply for review by the AAT allows those entities that have been affected by a decision of the Board to question the Board's exercise of its powers before an independent administrative body. For the reviewable decisions in 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.

2.68 A decision by the Board refusing to grant the applicant a shorter period in which to lodge their application for renewal of registration is also a reviewable decision against which the applicant can apply to the AAT for review. *[Paragraph 70-10(d)]*

2.69 The Board may impose one or more conditions on an entity's registration to limit the scope of services that the entity may provide to a particular type of tax agent service (such as providing advice as opposed to compliance work) or a particular area of the taxation laws (such as GST). *[Subsections 20-25(5) to (7)]*

2.70 In determining whether any limitations should be placed on an entity's registration:

- for an individual, the Board must have regard to the individual's qualifications and relevant experience; and
- for a company or partnership, the Board must have regard to the conditions that have been imposed on the registrations of the individuals working for that company or partnership. It would be inappropriate, for example, for a partnership to provide general income tax related services if the registered individuals working for it and supervising the provision of services are restricted under their own registrations to providing fringe benefits tax related advice.

[Subsection 20-25(7)]

2.71 This allows individuals with extensive experience in a specialised area of the taxation laws or in a particular type of tax agent service to be eligible for registration as agents provided all of the other registration requirements are satisfied.

2.72 A tax agent or BAS agent may apply to the Board to vary a condition imposed on their registration. The application must be in a form approved by the Board and supported by information or documents required by the Board. If the Board is satisfied that it is appropriate to vary a condition, then it may decide to vary it accordingly. *[Section 20-40]*

2.73 The Board may issue guidelines (which are legislative instruments — refer to paragraph 5.35 in Chapter 5 of this explanatory memorandum) to specify training courses for the purpose of varying or removing a condition placed on a registration. For example, the Board may specify that an agent must satisfactorily complete a specified course in preparing tax returns in order to remove a condition on a registration preventing them from doing so.

2.74 The Board's decisions to impose a registration condition and to refuse to vary a condition are reviewable decisions, for which the applicant can make an application to the AAT for a review.
[Subparagraph 70-10(a)(ii) and paragraph 70-10(c)]

2.75 The Board must notify an applicant of its decision to register or refuse to register within 30 days of that decision being made. If the Board grants an entity's application, it must notify the entity of the period of registration and any conditions imposed on the registration. If the Board refuses to register an entity, it must furnish the entity with reasons for the decision. However, failure by the Board to comply with these requirements does not affect the validity of the Board's decision. *[Subsection 20-30(1)]*

2.76 The Board must also notify the Commissioner of the Board's decision to register or refuse to register an entity. This will facilitate the Commissioner's administration of the Australian Taxation Office's (ATO) electronic interfaces with tax agents and BAS agents (eg, the tax agents' portal). *[Subsection 20-30(2)]*

2.77 The Board may, by written notice, require a tax agent or BAS agent to maintain professional indemnity insurance as specified in the notice, which may include requirements as to the level and essential terms of the insurance policy. The notice may be given at any time during the agent's registration. *[Subsection 20-30(3)]*

2.78 Tax agents and BAS agents are professionals who hold themselves out as having a special skill on which members of the community can rely. As they are agents for the client, they can be liable for any financial loss or damage which their clients suffer through failure or mistake. The requirement to have appropriate professional indemnity insurance cover ensures that those people who are exposed to the risks of financial loss resulting from agents' conduct are adequately protected and compensated.

2.79 In determining the appropriate type or level of professional indemnity insurance for tax agents and BAS agents, the Board may refer to the insurance level standards currently imposed by recognised professional associations, and the Commonwealth legislative framework regarding the capping of liabilities for damages, for guidance.

2.80 The Board has discretion not to impose additional professional indemnity insurance requirements on those tax agents and BAS agents who are already required to take out insurance by virtue of their membership with a relevant professional association.

2.81 In addition, the Board has discretion to exempt a tax agent or BAS agent from having to hold professional indemnity insurance if the entity can satisfy the Board that it has other satisfactory insurance arrangements in place.

Example 2.20

SupaTax is a franchisee and a registered tax agent. The franchise agreement specifies that SupaTax must take the professional indemnity insurance arrangement organised by the franchisor who is a foreign company. The franchisor purchased, at an industry standard, professional indemnity insurance cover overseas for the whole franchising group including SupaTax. In this case, as SupaTax already has an industry standard professional indemnity insurance arrangement in place, the Board may choose not to specify further requirements.

2.82 The Board's decision to require professional indemnity insurance is a reviewable decision, for which a tax agent or BAS agent can make an application to the AAT for a review. *[Paragraph 70-10(b)]*

Commencement and duration of registration

2.83 A tax agent's or BAS agent's registration commences on the date specified in the notice that the Board gives to the agent informing it of the Board's decision to grant its application for registration. For a renewal of registration, the agent's registration commences on the day after the expiry date of the previous registration. *[Paragraph 20-35(a)]*

2.84 Registration is valid for a period of at least three years. The Board has the power to determine a period longer than three years. Registration expires at the end of the period determined by the Board unless it is terminated before that time. *[Subsection 20-25(4) and paragraph 20-35(b)]*

Notification of a change in circumstances

2.85 A tax agent or BAS agent must notify the Board, in writing, of a change in circumstances that results in failure to continue to meet any of the registration requirements, or if an event affecting their continued registration happens to an agent that is an individual, or to a partner or director of a partnership/company agent (including a director of a corporate partner in a registered partnership) — refer to paragraph 2.47 for an outline of events affecting continued registration. *[Section 30-35]*

2.86 A tax agent or BAS agent who is a partnership must notify the Board when an event affecting continued registration happens to a partner or a director of a company that is a partner in the partnership. In addition, the partnership must notify the Board if the composition of the partnership changes. A tax agent or BAS agent who is a company must notify the Board if an event affecting continued registration happens to a director of the company, if one or more directors cease to be a director, or if one or more persons become a director of the company. *[Paragraphs 30-35(2)(b) and (c) and 30-35(3)(b) and (c)]*

2.87 For the purposes of the Bill, a change in the composition of a partnership does not affect the continuity of the partnership. In terms of registration, this means that a partnership's registration does not lapse every time a partner leaves or a new partner is admitted, provided the partners of the registered entity continue to comply with the partnership registration requirements, including the fit and proper person test. *[Section 70-20]*

2.88 A tax agent or BAS agent must notify the Board within 30 days of the day on which they became or ought to have become aware of the occurrence of any of these events. Failure to notify within the time frame is a breach of the Code (which may attract an administrative sanction) and/or an offence under section 8C of the TAA 1953 for failure to comply with requirements under a taxation law. *[Subsection 30-35(4)]*

Termination of registration

Grounds for termination

2.89 The Board may terminate registration if an agent breaches the Code (this is explained in Chapter 3 of this explanatory memorandum), if an agent ceases to meet the registration requirements, if the agent breaches a condition imposed on their registration, or, if they are an individual or a company, an event affecting the agent's continued registration happens to them — refer to paragraph 2.47 for an outline of events affecting continued registration. *[Paragraph 30-15(2)(d) and subsections 40-5(1), 40-10(1) and 40-15(1)]*

2.90 For a tax agent or BAS agent who is a partnership or company, where an event affecting continued registration happens to a partner or a director of a company that is a partner of a registered partnership, or a director of the registered company, as an alternative to a decision to terminate the registration, the Board may decide to require:

- the registered partnership to remove the partner, or the company that is a partner in the partnership to remove the director from its board of directors; or
- the registered company to remove the director from its board of directors.

[Subsections 40-10(1), (3) and (4), and 40-15(1) and (3)]

2.91 If the Board directs the removal of a partner/director from a partnership/company, it must do so by notice in writing that specifies a period within which the partnership/company must remove the partner or director. In determining a suitable period for the removal of a partner, the Board must have regard to the requirements of any law of the

Commonwealth, a state or a territory in relation to the removal of partners from partnerships. Similarly, when determining a suitable period for the removal of a director of a company, the Board must have regard to any requirement of the Corporations Act in relation to the removal of directors. *[Subsections 40-10(3) to (5), and 40-15(3)]*

2.92 Failure to follow the Board's direction in these circumstances may amount to a breach of the Code or may result in termination of registration. *[Subsections 40-10(3) and (4) and 40-15(3)]*

2.93 The Board may terminate the registration of a tax agent or BAS agent if the agent breaches a condition on their registration. *[Paragraphs 40-5(1)(c), 40-10(1)(b) and 40-15(1)(c)]*

Example 2.21

XXZ Co. is a registered tax agent. XXZ Co.'s tax agent registration is subject to a condition that it may only provide advice about indirect taxes for a fee, given that registered individual tax agents working for XXZ Co. specialise in providing indirect tax advice and are therefore restricted by conditions on their registrations to providing only such advice. To expand its business, XXZ Co. starts to accept work relating to income tax (eg, providing income tax advice and preparing income tax returns) and starts to recruit personnel who are registered tax agents without conditions. Unless XXZ Co. applies to the Board to vary its registration condition and the Board decides to make the variation, XXZ Co. is in breach of its registration condition. This exposes XXZ Co. to a risk that its registration may be terminated.

- 2.94 The Board must terminate an agent's registration:
- if the agent surrenders its registration to the Board by notice in writing; or
 - upon the death or dissolution of the agent.

[Subsections 40-5(2), 40-10(2) and 40-15(2)]

Example 2.22

SmallTax Pty Ltd is a registered tax agent with a single director and four employees. SmallTax Pty Ltd has decided to merge its business with SupaTax Ltd, another registered tax agent. SmallTax Pty Ltd closes down its business and surrenders its registration to the Board. The Board must terminate the registration of SmallTax Pty Ltd.

Notice and effect of termination

2.95 Where the Board has terminated a registration, it may specify a period of up to five years during which the agent is prohibited from making a fresh application for registration, except in the following circumstances where the termination is not related to the agent's character:

- where registration was terminated because the agent surrendered their registration by notice in writing; or
- where registration was terminated because the agent became an undischarged bankrupt or went into external administration.

[Section 40-25]

2.96 The exceptions listed above avoid the potentially unfair outcome that an agent who becomes an undischarged bankrupt or goes into external administration (eg, if they agree to be a guarantor for a loan) may be subject to a time period in which they cannot make an application for registration. Similarly, an agent who surrenders their registration of their own volition should not be prevented from re-applying for registration at any time in the future.

2.97 Where the Board has terminated the registration of a tax agent or BAS agent, the Board must notify the agent in writing of the decision and the reasons for the decision within 30 days of the decision being made. The Board must also notify the agent in writing of any determination of a period during which they are not eligible to apply for registration, within 30 days of the termination decision being made. However, failure by the Board to comply with this requirement does not affect the validity of the Board's decision. *[Subsection 40-20(1)]*

Example 2.23

The Board decides to terminate Kate's registration as she no longer meets the fit and proper person test for registration purposes, but does not notify Kate of its decision within the 30-day time limit. Despite the Board's failure to notify, its decision is still valid.

2.98 The Board must also notify the Commissioner of its registration termination decisions and reasons for the decisions. As noted in paragraph 2.76, notifying the Commissioner of certain decisions will facilitate his administration of the ATO's electronic interfaces with agents. *[Subsection 40-20(3)]*

2.99 The date of effect of the Board's decision to terminate a tax agent's or BAS agent's registration is the date specified by the Board in the termination notice. Rather than termination taking effect immediately, the Board must specify a termination date that is at least 28 days after the date of the notice. *[Subsection 40-20(2)]*

2.100 The fact that a decision to terminate a registration does not take effect until at least 28 days after a tax agent or BAS agent being notified of the decision allows sufficient time for the tax agent or BAS agent to apply to the AAT for a stay of the decision if they intend to apply to the AAT for a review. The absence of an upper limit for the period between the date of notice and the date of effect gives the Board flexibility to specify a date in the future to allow an agent to wind up their business and inform their clients.

2.101 Decisions by the Board to:

- terminate the registration of a tax agent or BAS agent; and
- determine a period during which a tax agent or BAS agent, whose registration has been terminated, may not make an application for registration,

are reviewable decisions for which the agent may apply to the AAT for a review. *[Paragraphs 70-10(e) and (h)]*

Chapter 3

The Code of Professional Conduct

Outline of chapter

3.1 Part 3 of this Bill provides that tax agents and Business Activity Statement (BAS) agents are required to comply with a legislated Code of Professional Conduct (Code) and that failure to comply with the Code may attract administrative sanctions imposed by the Tax Practitioners Board (Board).

3.2 Subdivision 70-B of Part 7 of the Bill provides for decisions of the Board to impose administrative sanctions to be reviewable by the Administrative Appeals Tribunal (AAT).

Context of amendments

Operation of current provisions

Code of Professional Conduct

3.3 The current law does not have a comprehensive code to govern the conduct of tax agents and BAS agents. Section 251K of the *Income Tax Assessment Act 1936* (ITAA 1936) provides that a tax agent's or a nominee's registration may be cancelled or suspended for certain specified conduct, for example, the intentional preparation of a false return.

3.4 Currently, some — but not all — tax agents have to comply with a code of conduct through their membership of a professional association. Each association has a separate code and not all tax agents are members of a professional association. Consequently, tax agents who do adhere to a code currently adhere to slightly different professional and ethical standards.

Administrative sanctions

3.5 The only administrative sanctions that are currently available to the state Tax Agents' Boards (state Boards) are suspension or cancellation of registration. This can leave the state Boards without an effective

response to conduct that is not desirable, but does not warrant depriving a person of their livelihood.

3.6 Subsection 251K(1) of the ITAA 1936 provides that the state Boards must suspend or cancel the registration of a tax agent or nominee if they have been convicted of a specified offence.

3.7 Subsection 251K(2) of the ITAA 1936 provides that the state Boards may suspend or cancel the registration of a tax agent or nominee if the state Board is satisfied that:

- any return prepared by the tax agent is false in any material particular;
- the tax agent has neglected the business of a principal;
- the tax agent has been guilty of misconduct; or
- the tax agent or the nominee of a tax agent is not a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers.

3.8 A state Board must cancel the registration of a tax agent under subsections 251K(3C) and (4) if:

- for individuals:
 - the tax agent has become an undischarged bankrupt and/or permanently ceases to carry on a business as a tax agent;
- for partnerships:
 - there is no partner registered as a nominee of the partnership, any partner becomes an undischarged bankrupt, or the partnership permanently ceases to carry on a business as a tax agent; and
- for companies:
 - there is no employee registered as a nominee of the company, the company goes into liquidation, or the company permanently ceases to carry on a business as a tax agent.

Negligence

3.9 Section 251M of the ITAA 1936 currently provides that a tax agent is liable to pay a fine, penalty or interest charge that a taxpayer has incurred due to the negligence of the tax agent. The amount that is recoverable from the tax agent does not take into account any contributory negligence of the taxpayer.

Rationale for major changes

Code of Professional Conduct

3.10 A new legislated code sets out the conduct expected of tax agents and BAS agents, thereby giving taxpayers greater confidence that they are dealing with agents who have, and maintain, appropriate ethical and professional standards.

Administrative sanctions

3.11 The Bill provides the Board access to a graduated range of administrative sanctions for breaches of the Code, so that the Board is able to respond to breaches appropriately.

Negligence

3.12 The Bill removes the special statutory cause of action allowing taxpayers to recover a penalty, fine or interest charge incurred due to the negligence of their tax agent. This provision of the current law does not allow contributory negligence of the taxpayer to be taken into account. It is also out of step with state laws that cap liability for negligence at common law. Although these issues could have been addressed by amending the provision, this would add significant complexity. Moreover, the new regime addresses the concerns that gave rise to the old provision in a more direct way.

3.13 First, the income tax law with respect to interest charges has changed considerably since the statutory remedy was originally enacted. Now, under the Shortfall Interest Charge, interest charges for tax shortfalls are four percentage points lower than the General Interest Charge. The reduced Shortfall Interest Charge therefore does not contain a penalty element, but merely seeks to neutralise the *loan benefit* that taxpayers might typically receive from the temporary use of the shortfall amount. Consequently, errors of any type by tax agents will not generally have a penalty impact on taxpayers.

3.14 Secondly, under the new regime certain administrative penalties will no longer be imposed on taxpayers for the carelessness of their tax agent or BAS agent.

3.15 Taxpayers retain a cause of action at common law to recover damages from their tax agent or BAS agent for the negligence of their agent and a cause of action under section 52 of the *Trade Practices Act 1974* to recover damages from their agent for engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. Note that the primary tax cannot be recovered under a statutory negligence claim, but may be recovered under a common law negligence claim in certain situations.

Summary of new law

3.16 The ethical and professional standards required of tax agents and BAS agents in the provision of tax agent services for a fee or other reward are set out in the Code, which governs the conduct of all tax agents and BAS agents. ('Tax agent service' includes 'BAS service' — refer to paragraph 2.19 in Chapter 2 of this explanatory memorandum.)

3.17 If the Board finds that an agent has breached the Code, it may impose one or more of a range of graduated administrative sanctions. The sanctions the Board may impose include:

- cautioning the agent;
- requiring the agent to complete a course of training;
- subjecting the agent to specified restrictions when conducting their practice;
- requiring the agent to practise under supervision; and/or
- suspending or terminating the agent's registration.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Code governs the conduct of tax agents and BAS agents. The Code establishes the professional and ethical standards required of agents.	There is no equivalent, comprehensive code to govern the conduct of tax agents and BAS agents. Section 251K of the ITAA 1936 provides that a tax agent's or a nominee's registration may be cancelled or suspended for certain specified misconduct, for example, the intentional preparation of a false return.
In addition to suspension and termination of registration, the Board may impose one or more of a range of administrative sanctions.	The state Boards may suspend or cancel registration, or take no action.
No statutory action in negligence against a tax agent or BAS agent.	An entity is entitled to recover the amount of the fine, penalty or interest charge from a tax agent, nominee or an exempted person under section 251L of the ITAA 1936, if the reason they are liable to pay that amount is a result of the negligence of the tax agent, nominee or the exempted person.

Detailed explanation of new law

Code of Professional Conduct

Application of the Code

3.18 The Code governs the conduct of all tax agents and BAS agents.
[Section 30-5]

3.19 The purpose of having a legislated code is to establish clearly the professional and ethical standards required of tax agents and BAS agents, whether or not agents are members of a professional association. The Code outlines the duties that agents owe to their clients, the Board and other agents.

3.20 The introduction of the Code, together with mechanisms for enforcing it, will ensure that tax agents and BAS agents possess appropriate skills and knowledge. The Code will not, however, place an

additional burden on competent agents. Rather, it adopts existing best practices, reflecting what is required of professionals under the codes of conduct of related professions, such as the accounting and legal professions.

Principles of the Code

3.21 The Code consists of a list of core principles. A single instance of a particular conduct may amount to a contravention of more than one of these principles.

3.22 The principles are set out under five categories:

- honesty and integrity;
- independence;
- confidentiality;
- competence; and
- other responsibilities.

3.23 The Board is responsible for administering the Code, and has the power to issue guidelines (which are legislative instruments — refer to paragraph 5.35 in Chapter 5 of this explanatory memorandum) to explain how elements of the Code apply in practice. Agents may rely on the guidelines issued by the Board to apply the Code to their circumstances.

Honesty and integrity

3.24 Tax agents and BAS agents must behave honestly and with integrity. *[Subsection 30-10(1)]*

Example 3.1

Jack maintains a bank account in a false name and omits the interest from his income tax return. Jill, a registered tax agent, assisted Jack to set up this account. The Board may conclude that such behaviour calls into question Jill's honesty and integrity.

3.25 Tax agents and BAS agents must comply with the taxation laws in the conduct of their personal affairs. *[Subsection 30-10(2)]*

3.26 The definition of a 'taxation law' in section 995-1 of the *Income Tax Assessment Act 1997* covers those Acts (or parts of Acts) of which the Commissioner of Taxation (Commissioner) has the general administration, and any regulations under those Acts. (Note that the

definition of ‘taxation law’ will be amended to include the Tax Agent Services Bill 2008 and associated regulations — refer to paragraph 1.32 in Chapter 1 of this explanatory memorandum.)

3.27 An agent would ordinarily comply with the taxation laws when they take a position in interpreting the law that is reasonably arguable. This applies even if the Commissioner subsequently interprets the law differently from the position the agent has taken.

3.28 Tax agents and BAS agents must properly discharge their own personal tax obligations, including lodging their personal income tax returns and activity statements on time.

Example 3.2

Mukesh is a registered tax agent. For the past two years, Mukesh has failed to lodge his own income tax return. Each failure to lodge his tax return amounts to a breach of the Code as Mukesh has failed to comply with a taxation law in the conduct of his personal affairs.

3.29 Agents’ personal affairs include affairs relating to the agent’s tax agent or BAS agent practice. This would encompass, for example, the agent’s duties and obligations with regard to maintaining their registration.

Example 3.3

Tyler & Associates is a partnership and a registered tax agent. If Tyler & Associates is required under the taxation laws to notify the Board of changes to the composition of the partnership within 30 days of the event, and it fails to do so, it would be in breach of the requirement to comply with the taxation laws in the conduct of its personal affairs.

3.30 Tax agents and BAS agents must account for money or other property they receive on trust from or on behalf of their clients. This may include money received from a client in advance for the provision of tax agent services. Where money or other property has been received and is held on trust, agents must account for it to their client and may only disburse the money or property in accordance with the client’s instructions or as otherwise authorised by the operation of the law. For example, a tax agent or BAS agent may disburse money or property from the trust account if the Commissioner issues a notice under section 260-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) requiring the agent to pay to the Commonwealth the money held in the client’s trust account to satisfy a tax related liability of the client.

[Subsection 30-10(3)]

3.31 To comply with this requirement, agents must establish a trust account separate from their general business operating account to receive money on trust. This is consistent with good practice as set out in the accounting professional standards of the recognised professional associations and relevant state laws such as the Legal Profession Acts and trust accounts Acts in various Australian jurisdictions. In addition, the Board may issue guidelines that provide further guidance on this requirement.

Example 3.4

Anthony, a registered tax agent, receives money on trust from his clients. To account for all the trust money he receives from clients, Anthony sets up a separate trust account with an authorised deposit-taking institution. Other than where the law requires him to do so, Anthony is only permitted to disburse the money in the trust account at his clients' instruction.

Independence

3.32 Tax agents and BAS agents must always act lawfully in the best interests of their client. *[Subsection 30-10(4)]*

3.33 As tax agents and BAS agents are agents of their clients, they must act in the best interests of their clients. However, tax agents and BAS agents also operate as an intermediary between taxpayers and the tax administration and therefore owe duties not only to their clients but also to the community. As such, their obligations to their clients must be subject to the law.

Example 3.5

Michael works in the hospitality industry. He engages Rahul, a registered tax agent, to prepare and lodge his income tax return. He instructs Rahul to claim a deduction for work clothing for the black trousers he is required to wear. Although Michael might believe it is in his best interest to reduce his taxable income, Rahul is aware that Michael cannot claim the cost of his work clothing as an allowable deduction because the trousers are not protective or specific to his occupation. Rahul advises Michael accordingly and must not act in accordance with Michael's instruction.

3.34 Tax agents and BAS agents must ensure that they have adequate arrangements in place to manage any conflicts of interest that may arise, wholly or partially, in relation to the provision of tax agent services. *[Subsection 30-10(5)]*

3.35 Tax agents and BAS agents are required to ensure that their objectivity is not impaired by an actual or potential conflict of interest. In

some circumstances, regardless of the arrangements put in place, the agent will not be able to remain objective, and therefore should not perform the services for the client.

3.36 The adequacy of conflict management arrangements depends on the nature, scale and complexity of the agent's business, the nature of the service provided and the information obtained by the agent. Some effective ways of managing conflicts of interest may be through the use of ethical walls or through disclosure of a conflict of interest (and/or informed consent to it) in the form of a waiver signed by the client/s where the disclosure is specifically authorised or otherwise permitted (eg, see paragraph 3.37).

Example 3.6

James and Margie, recently divorced, have used the same registered tax agent, Sally, for the past 10 years. In preparing their returns post divorce it became apparent to Sally that the claiming of a deduction by James would have prevented the claiming of a deduction by Margie. Although Sally's professional judgment was that the deduction was more properly claimable by James, she was in a position where her duty to Margie was in conflict with her duty to James. Sally discloses the conflict and receives a waiver from both clients. She is not in breach of the Code.

Confidentiality

3.37 Tax agents and BAS agents are only permitted to disclose a client's confidential information to a third party where they receive specific authority from their client, or where there is a legal duty to disclose. *[Subsection 30-10(6)]*

Example 3.7

Lilly & Co. is a large accounting firm and a registered tax agent. To minimise its operating costs, Lilly & Co. enters into an agreement with a bookkeeping/data processing firm in Hong Kong, Zheng & Co., that Zheng & Co. will perform the bookkeeping and data processing work for Lilly & Co.'s clients. In order to send the clients' information to Zheng & Co. for processing, Lilly & Co. is required to disclose its arrangement with Zheng & Co. to its clients and obtain its clients' explicit permission.

Example 3.8

The Australian Taxation Office (ATO) is conducting an audit on Patricia's income tax return from the previous financial year, but Patricia does not have all of her receipts and payment summaries. As her registered tax agent, Edward, completed her tax return, the ATO

has issued a notice under section 264 of the ITAA 1936 for Edward to provide it with all relevant information regarding Patricia's income tax return from the previous financial year. Although Edward is required to maintain the confidentiality of Patricia's information, the notice creates an overriding legal obligation. Edward must therefore provide the ATO with the information requested in the notice.

3.38 A third party is an entity other than the client to whom the information relates. Specific authority is required to disclose information relating to one entity within a service trust structure to another entity within the same structure unless the client is defined, for example in the engagement letter, as the whole structure.

Competence

3.39 Tax agents and BAS agents must ensure that a tax agent service they provide, or that is provided on their behalf, is provided competently. *[Subsection 30-10(7)]*

3.40 This requirement prevents tax agents and BAS agents with narrow, specialised knowledge from providing tax agent services that are outside of their area of expertise.

3.41 Tax agents and BAS agents must not provide a tax agent service or BAS service if they do not have sufficient knowledge, skill or resources to ensure that the service provided by them or on their behalf is provided competently. To ensure competent provision of services, an agent may:

- obtain expert advice and assistance;
- obtain knowledge and skill through private study and research; or
- inform the client of the likely delay and cost to acquire the requisite knowledge and skill to provide the service competently and obtain the client's voluntary consent to the tax agent or BAS agent providing the service.

Example 3.9

Matilda is a registered tax agent. The majority of the tax agent services that Matilda provides involves the preparation and lodgment of income tax returns for small businesses in the suburb in which she practises. Matilda's client, Thom, seeks tax advice on some mergers and acquisitions transactions that his company is contemplating. Provision of this advice involves areas of the taxation laws with which Matilda is not familiar. Matilda may be in breach of the Code if she provides the tax advice to Thom for a fee unless she can otherwise satisfy the Board that she is competent to give that advice.

Example 3.10

Peter is an Australian legal practitioner and obtained (unconditional) tax agent registration based on his experience of providing tax agent services (other than the preparation and lodgment of returns) as a legal practitioner. Peter breaches this requirement of the Code if he prepares and lodges returns on behalf of his clients for a fee unless he can satisfy the Board that he is competent to do so, for example, if he has undertaken private study of materials published by the ATO and available on its website and/or has completed certain courses on return preparation.

3.42 Tax agents and BAS agents are also accountable for tax agent services provided on their behalf. Entities that agents may engage to provide tax agent services on their behalf are not limited to individuals who are their employees or under their supervision and control.

3.43 To ensure that services provided on their behalf are provided competently, tax agents and BAS agents must ensure that the provider of the service has appropriate skills and experience, and that their work is adequately supervised or otherwise reviewed.

3.44 The adequacy of supervision depends on factors such as the educational qualifications and extent of experience of the provider, the actual service being provided and the structures or processes in place within an organisation to facilitate the competent provision of tax agent services.

Example 3.11

Wayne is a registered tax agent. Wayne outsources payroll-related services to Leigh who is not a registered agent. While direct supervision and control by Wayne is not possible in the circumstances, Wayne must ensure that the payroll services provided on his behalf by Leigh are provided competently by reviewing Leigh's work to ensure its accuracy.

If Leigh is a registered BAS agent whose expertise is in payroll services, then Wayne may meet this requirement of the Code without reviewing Leigh's work.

3.45 A tax agent or BAS agent must maintain up-to-date knowledge and skills relevant to the tax agent services they provide. In this regard, tax agents and BAS agents are required to maintain and improve their knowledge and skill in the areas of the taxation laws and tax administration which relate to the tax agent services they provide. Keeping up-to-date with developments in the relevant taxation laws and tax administration may require agents to undergo a certain minimum

number of hours of tax related continuing professional education per year as determined by the Board. *[Subsection 30-10(8)]*

3.46 The Board may issue a guideline listing the training that is available in the market (including face-to-face training courses, distance learning and online courses) as being sufficient for continuing professional education purposes for this principle of the Code. For this purpose, any person or organisation can make a recommendation to the Board to have their training courses listed. The courses are not restricted only to those offered by recognised professional associations, recognised BAS agent associations, tax agents or BAS agents.

3.47 When providing tax agent services that involve a statement being made to the Commissioner or something else being done on behalf of a client, tax agents and BAS agents must take reasonable care when ascertaining the facts around their client's affairs that are relevant to the service being provided. *[Subsection 30-10(9)]*

3.48 This requirement applies if a tax agent or BAS agent is acting pursuant to a taxation law on behalf of their client, for example, preparing and lodging a return on behalf of a client — refer to paragraph 3.55 for the requirement to take reasonable care in applying the law in relation to the provision of advice.

3.49 Tax agents and BAS agents are only required to take reasonable care in ascertaining their clients' state of affairs insofar as the state of those affairs is relevant to the service that they have been engaged to provide. That is, the requirement is subject to the agreed scope of the engagement between the agent and their clients.

3.50 Where the agreed scope of the tax agent services excludes the examination of information provided by the client or requires the tax agent to rely on the information or advice of another expert, then further enquiries would not be required unless the agent identifies, or reasonably ought to have identified, that the information was incorrect or incomplete.

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

3.52 In many cases, taking reasonable care means that agents must ask their clients the appropriate questions, based on their professional knowledge and experience, in seeking the information. Where there are grounds to doubt the information provided by a client, the agent must

make reasonable enquiries as to the completeness or correctness/accuracy of that information.

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

3.54 However, if a client provides information to their agent that seems to be implausible or inconsistent with a previous pattern of claim or statement, further inquiries would be required. While tax agents and BAS agents are not required to audit, examine or review books and records or other source documents to independently verify the accuracy of information supplied by their clients, agents do not discharge their responsibility in such a case by simply accepting what they have been told.

Example 3.12

Alfred & Co. is a registered tax agent and has been engaged by XYZ Media to conduct a review of its annual income tax return prepared by its in-house tax manager. In reviewing the draft return, Alfred & Co. identifies an apparent inconsistency in the information contained in the return, namely that the value of the stock on hand is less than the daily stock turnover. As such, Alfred & Co. must make further enquiries to resolve the inconsistency.

Example 3.13

Ozz & Associates, a registered tax agent, has been engaged by Abco Media to prepare its annual income tax return, based on the audited financial statements of Abco Media (Ozz & Associates is not the auditor).

Ozz & Associates determines that it can rely on the information provided by Abco Media, because it has appropriate staff involved in its financial function and Ozz & Associates has no reason to doubt the quality of the materials provided in the course of the tax return preparation engagement.

Ozz & Associates is not required to undertake audit-like activities, such as comparing the value of trading stock on hand at the end of the year with average daily sales, in relation to the facts which underlie the financial records from which the return is prepared.

Example 3.14

Stefan, a registered tax agent, has been engaged by Walsh Ltd to prepare its income tax return. Walsh Ltd gave Stefan all of its tax information, including its BAS and goods and services tax (GST) reconciliation accounts prepared by Craig, a BAS agent.

As Craig is a registered BAS agent, it would normally be reasonable for Stefan to accept Craig's work at face value. However, based on previous examination of other work by Craig, Stefan has doubts as to the accuracy of Craig's work.

In these circumstances, it is not reasonable for Stefan to accept Craig's work at face value. In this case, Stefan can demonstrate having taken reasonable care in various ways. These might include reviewing the original documentation (eg, tax invoices) or satisfying himself of the procedure and methodology Craig used to arrive at a particular determination.

Stefan may decide to alert the Board to his concerns about the accuracy of Craig's work.

3.55 Tax agents and BAS agents must take reasonable care to apply the taxation laws correctly to the circumstances in relation to which advice is sought. The circumstances may be the actual circumstances of their clients or the hypothetical circumstances provided by their clients.
[Subsection 30-10(10)]

3.56 This provision does not require agents to determine the correct application of the law, rather it requires agents to take *reasonable care* to ensure the correct interpretation and application of the law.

3.57 Where an agent is uncertain about how a taxation law applies to a particular set of circumstances, it must seek clarification from relevant authorities and sources such as:

- legislation and relevant extrinsic material (eg, explanatory memoranda);
- relevant case law;
- the Commissioner's views as expressed in rulings and determinations on the topic;
- the Commissioner's instructions in documents such as income tax return form instructions, BAS instructions, fact sheets and practice statements;

- information published or provided by a recognised professional association, recognised BAS agent association or legal professional association; or
- information published by experts, other agents or specialists and other relevant commentaries.

Example 3.15

Justin is a registered tax agent. Bryn engages Justin to provide GST-related tax advice. As the majority of Justin's work involves providing income tax advice or preparing and lodging income tax returns, his experience and knowledge in the GST law is not up-to-date. Without carrying out any further research into the subject matter (eg, checking the relevant law and publications by the ATO on the subject), Justin provides the advice based on his existing knowledge of the GST law obtained through certain professional education courses he attended several years ago. As a result, Justin's advice to Bryn is incorrect. Justin is in breach of the Code for failing to take reasonable care to ensure the correct application of the taxation laws to Bryn's circumstances.

3.58 Where an agent, after consulting the relevant authorities and sources, is still uncertain of how to apply a taxation law, the agent may choose to seek assistance from another party, such as another agent, a legally qualified professional, a recognised professional association or recognised BAS agent association, a legal professional association, or the ATO. The agent should be satisfied that the individual or organisation from which assistance is sought has the ability and resources to provide advice on the taxation laws. If the client is to bear the associated costs, the agent should seek approval from the client before seeking such assistance.

3.59 One method of clarifying the application of a relevant law is to seek a private ruling from the ATO (see Division 359 of Schedule 1 to the TAA 1953). Private rulings can be relied upon by taxpayers to bind the Commissioner. However, there is no obligation for the taxpayer to act in accordance with the ruling. A taxpayer or agent may object under Part IVC of the TAA 1953 where he or she applies for a private ruling and the Commissioner fails to make the ruling and has not otherwise declined to make the ruling within a certain time period.

Other responsibilities

Proper administration of the taxation laws

3.60 Tax agents and BAS agents must not knowingly obstruct the proper administration of the taxation laws. *[Subsection 30-10(11)]*

Example 3.16

Stella is a registered tax agent. Stella becomes aware that the ATO is investigating the tax affairs of one of her clients, Georgia. To delay the investigation process, Stella removes documents relating to Georgia's tax affairs from her business premises and 'misplaces' them elsewhere. Stella is in breach of this principle of the Code.

3.61 Relying on the agent's or the client's lawful rights to withhold documents or not provide information, such as legal professional privilege or accountants' concession, is not a breach of this requirement.

Example 3.17

Elizabeth is a registered tax agent. Greg is one of Elizabeth's clients. The ATO is conducting an audit of Greg and serves a notice under section 264 of the ITAA 1936 on Elizabeth to obtain information relating to Greg's tax affairs. After consulting with Greg, Elizabeth delays compliance with the notice, however she provides the required information within the time frame specified on the notice. Elizabeth is not knowingly obstructing the proper administration of the taxation laws.

Example 3.18

Henry is a registered tax agent. Ella is one of Henry's clients. In response to a notice under section 264 of the ITAA 1936 being served on Henry to provide documents relating to Ella to the ATO, Henry, on behalf of Ella, claims accountants' concession, in good faith, over some of the documents sought. Henry is not in breach of this requirement by claiming the concession.

If, however, Henry knows that the documents sought are not within the scope of the accountants' concession, and still claims they are in an effort to delay the process, he would be in breach of this requirement.

Advising clients of their rights and obligations

3.62 Tax agents and BAS agents must advise clients of their rights and obligations under the taxation laws that are materially related to the services being provided. *[Subsection 30-10(12)]*

3.63 The advice may include:

- an explanation of the nature of self assessment, including the Commissioner's ability to amend an assessment within a certain time of the original assessment;

- the client's obligation to keep proper records and the consequences of not doing so;
- that the responsibility for the accuracy and completeness of the particulars and information required to comply with the taxation laws vests with the client; and
- where necessary, the rights or options available to clients including how to seek a private ruling and how to object or appeal against adverse decisions made by the Commissioner.

3.64 However, a tax agent or BAS agent is only required to advise a client of their rights and obligations that are relevant to services within the scope of engagement between the tax agent or BAS agent and the client. One way of advising clients of their relevant rights and obligations under the taxation laws is to outline them in the engagement letter between the agent and their clients.

Holding professional indemnity insurance

3.65 A tax agent or BAS agent is required to maintain appropriate professional indemnity insurance. *[Subsections 20-30(3) and 30-10(13)]*

3.66 Given that some agents may already maintain appropriate professional indemnity insurance, it is not mandatory for the Board to specify professional indemnity insurance for all agents. However, the Board is expected to give notice in writing requiring an agent who does not have appropriate professional indemnity insurance to maintain professional indemnity insurance as specified — refer to paragraph 2.77 in Chapter 2 of this explanatory memorandum.

Following the directions of the Board

3.67 A tax agent or BAS agent must respond to requests and directions from the Board in a timely, responsible and reasonable manner. *[Subsection 30-10(14)]*

3.68 A tax agent or BAS agent may have to balance their obligation to comply with requests from the Board against other professional obligations, such as common law privileges or statutory obligations. Consequently, claiming legal professional privilege or other legal rights of the client is not an unreasonable response to a direction of the Board.

3.69 Where there is no conflict of obligations, failure to follow a direction of the Board will amount to a breach of the Code and may attract an administrative sanction.

Example 3.19

Mario is a director of M&J Tax Pty Ltd, a registered tax agent. Recently, Mario was penalised for being a promoter of a tax exploitation scheme, which is an event affecting M&J Tax Pty Ltd's continued registration. The Board subsequently informed M&J Tax Pty Ltd, by notice in writing, that it was required to remove Mario from its Board of Directors within a certain period. M&J Tax Pty Ltd ignores the Board's direction and allows Mario to continue to sit on its Board of Directors. This failure to follow the Board's direction is a breach of the Code.

Administrative sanctions for failing to comply with the Code of Professional Conduct

3.70 Compliance with the Code is mandatory for all tax agents and BAS agents. If tax agents and BAS agents do not comply, they may be subject to administrative sanctions imposed by the Board.

3.71 The sanctions available to the Board allow the Board to tailor the sanction to the seriousness of the conduct that breaches the Code. The purpose of the sanctions is not primarily to punish tax agents and BAS agents, but rather to improve the performance of agents and maintain public confidence in agents' adherence to certain standards.

3.72 Where, following an investigation, the Board is satisfied there has been a breach of the Code, the Board may impose any one or more of the following sanctions *[section 30-15(1)]*:

- a written caution *[paragraph 30-15(2)(a)]*;
- an order requiring the tax agent or BAS agent to take one or more actions including, but not limited to, the following:
 - complete a course of education or training specified in the order by the Board *[paragraphs 30-15(2)(b) and 30-20(1)(a)]*;
 - provide services (for which the tax agent or BAS agent is registered) only under the supervision of another tax agent or BAS agent that has been specified in the order *[paragraphs 30-15(2)(b) and 30-20(1)(b)]*; and/or
 - provide only those services that are specified in the order *[paragraphs 30-15(2)(b) and 30-20(1)(c)]*;
- suspension of registration *[subsection 30-25(1) and paragraph 30-15(2)(c)]*; and/or

- termination of registration [section 30-30 and paragraph 30-15(2)(d)] — refer to paragraphs 2.95 to 2.101 in Chapter 2 of this explanatory memorandum for notice and effect of a termination.

Example 3.20

Arif is a registered BAS agent. Several complaints have recently been made to the Board regarding Arif.

As a result of investigating Arif, the Board discovers that he has made numerous errors in advising clients, largely in relation to recent developments in the taxation laws. Arif has not undertaken any continuing professional education in accordance with the guidelines issued by the Board for the last two years. The Board concludes that Arif is in breach of the Code (subsections 30-10(7) and (8)) for, in part, failing to maintain up-to-date knowledge and skills relevant to the tax agent services he provides. Since this is Arif's first breach of the Code, and to ensure that Arif is appropriately supervised until he updates his knowledge, the Board may impose sanctions such as issuing Arif with a written caution, together with orders to complete the necessary further training and to work under another agent's supervision until he completes the further training.

3.73 The graduated range of sanctions provides the Board with the capacity to tailor its response to the severity of the breach of the Code. For instance, in the case of isolated mistakes, the Board may take no specific action, or issue a written caution. For repeated mistakes the Board may issue an order specifying that the tax agent or BAS agent must undertake further education or training in the particular area. In more severe cases, where a tax agent or BAS agent has displayed a serious disregard for the Code, suspension or termination of registration may be appropriate. This is particularly so where a tax agent or BAS agent causes serious damage to their clients, or to the integrity of the tax system. Behaviour that calls into doubt the honesty, integrity or competence of a tax agent or BAS agent, or raises questions about their suitability to practise, may warrant more severe sanctions such as suspension or termination of registration.

Example 3.21

Complaints are made to the Board that Christine, a tax agent whose registration is limited to the provision of advice about the fringe benefits tax law, has been giving some of her clients advice about their broader income tax obligations over the course of several months. Christine is acting outside her expertise and would be in breach of both the conditions placed on her registration and the Code for providing a tax agent service which she is not competent to provide.

The Board is satisfied that the allegations against Christine are true and decides to impose an administrative sanction. While the Board can terminate Christine's registration for failing to comply with a registration condition or the Code, given that this is the first time that Christine has been found to have breached a condition of her registration and the Code, the Board may choose to issue Christine with a written caution for failing to comply with the Code and a condition of her registration and order her to provide only those services which she is registered to provide.

Example 3.22

Rithy is a registered tax agent. It is brought to the Board's attention that for the 2007-08 financial year Rithy lodged 22 income tax returns on behalf of clients containing mistakes in relation to allowable deductions. The Board orders Rithy to undertake a course in taxation law specialising in general and specific deductions. Rithy ignores the Board's direction and fails to comply with the order by the notified date. When questioned as to the cause of his failure to comply, he responds simply that he has been too busy. Rithy fails to comply with a new order for training issued by the Board with an extended date. The Board may subsequently decide to suspend Rithy's registration for displaying a serious disregard of the Code by repeatedly failing to follow directions of the Board.

3.74 The Board may decide not to impose an administrative sanction against a tax agent or BAS agent for immaterial breaches of the Code. Some breaches of the Code may be so trivial or isolated that it would be unlikely for the Board to take any further action against the agent.

Example 3.23

Dave is a registered BAS agent. Dave has lodged his own tax returns on time for many years. Due to a sudden spike in workload, he fails to lodge his own income tax return on time (being a month late) and is referred by the ATO to the Board for appropriate action. In this case, although Dave is in breach of the Code for failure to comply with the taxation laws in the conduct of his personal affairs, the Board may choose not to impose any sanction.

Period of orders

3.75 The Board may specify the period of time in which the tax agent or BAS agent must comply with requirements in the order, or alternatively, the time period during which the agent must perform certain requirements stated in the order. *[Subsection 30-20(2)]*

Period of suspension of registration

3.76 Where the Board decides to suspend the registration of a tax agent or BAS agent, the Board may determine the period of suspension that applies to the agent. If the agent's registration has already been suspended, the Board can extend that suspension for a further period, which commences at the end of the original suspension period.

[Subsections 30-25(1) and (3)]

3.77 Tax agents and BAS agents must not provide tax agent services while their registration is suspended. If an agent provides tax agent services in these circumstances, the Board may impose further administrative sanctions, for example, it may suspend the agent's registration for a further period or terminate registration. Alternatively (or additionally), the Board may apply to the Federal Court for a civil penalty order and/or an injunction to restrain the agent from continuing to provide tax agent services — refer to Chapter 4 of this explanatory memorandum for an explanation of civil penalty orders and injunctions.

[Subsections 30-25(2) and (4)]

3.78 A tax agent or BAS agent under suspension can apply for registration if their registration is due to expire during or after the suspension period and must, where required, notify the Board of a change in circumstances. The Board can also impose further administrative sanctions, including termination for failure to comply with the registration requirements or failure to comply with the Code, during the suspension period. The agent is not, however, taken to be a tax agent or BAS agent for any other purpose during the suspension period. *[Subsection 30-25(4)]*

Example 3.24

Luke has had his registration suspended by the Board for engaging in conduct that breaches the Code. Luke does not inform his clients that his registration has been suspended and continues to provide tax agent services. The Board applies to the Federal Court for a civil penalty order against Luke for providing tax agent services for a fee while unregistered. At the same time, the Board also applies to the Federal Court for an injunction to restrain Luke from continuing to provide tax agent services to his clients during the period of his suspension.

Notification of the Board's decision

3.79 Where the Board sanctions a tax agent or BAS agent, the Board must notify the agent of its decision in writing. The notice must contain the reasons for the Board's decision — refer to Chapter 5 of this explanatory memorandum for notification requirements following an investigation by the Board that results in the imposition of a sanction.

[Subsections 30-20(2), 30-25(1) and 40-20(1) and paragraphs 60-125(8)(c) and (d)]

3.80 A decision by the Board to impose an administrative sanction is a reviewable decision for which the tax agent or BAS agent may apply to the AAT for a review. This includes decisions to make an order and to specify a time period in an order, a decision to suspend registration, including a decision as to the length of the suspension, and termination decisions — refer to paragraph 2.67 in Chapter 2 of this explanatory memorandum for further explanation of AAT review of Board decisions.
[Paragraphs 70-10(e) to (g)]

Chapter 4

Civil penalties and injunctions

Outline of chapter

4.1 Part 5 of this Bill outlines the civil penalties to which unregistered entities, tax agents and Business Activity Statement (BAS) agents may be liable for contravening a civil penalty provision under the Bill, and the way in which orders for civil penalties are obtained.

4.2 Specifically, Part 5 of the Bill provides:

- for unregistered entities' liability for civil penalties for engaging in conduct that is prohibited without registration, as follows:
 - providing tax agent services or BAS services for a fee or other reward;
 - advertising the provision of tax agent services or BAS services; and
 - making representations of being registered;
- for registered entities' liability for civil penalties for engaging in certain serious misconduct while registered, as follows:
 - making a false or misleading statement;
 - employing or using the services of an entity whose registration has been terminated in certain circumstances; and
 - signing a declaration or statement that relates to a document which was prepared by an entity other than the tax agent or BAS agent, another tax agent or BAS agent, or an individual under the supervision and control of a tax agent or BAS agent; and

- that the Tax Practitioners Board (Board) may apply to the Federal Court of Australia (Federal Court) for an order for a civil penalty.

4.3 Subdivision 70-A of Part 7 of the Bill provides that the Board may apply to the Federal Court for an injunction to prevent or compel certain action if an entity has engaged or proposes to engage in conduct that contravenes a civil penalty provision.

4.4 Section 70-20 of the Bill provides that, for the purpose of the Bill, a change in the composition of a partnership does not affect the continuity of the partnership.

4.5 Section 50-40 introduces special rules relating to the liability for civil penalties of partners in a partnership that contravenes a civil penalty provision.

Context of amendments

Operation of current provisions

Criminal penalties

4.6 Subsection 251L(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) provides for a criminal penalty for a person who provides any of the specified services listed in the subsection for a fee without being registered. Subsection 251L(6) specifies certain entities that may provide a BAS service for a fee without registration.

4.7 Section 251O of the ITAA 1936 provides for a criminal penalty for an unregistered person who advertises that they will provide income related services or who represents that they are a tax agent.

4.8 Section 251N of the ITAA 1936 provides for a criminal penalty for a tax agent who allows another person (who is not a partner in the partnership or their employee, or a tax agent) to prepare income tax returns or conduct other business relating to any income tax matter on their behalf.

Rationale for major changes

4.9 In accordance with the Commonwealth guide to framing civil penalties, civil penalties are considered more appropriate than criminal penalties for conduct that is prohibited without registration and for serious misconduct while registered. This is because such conduct is not

considered serious enough to warrant the imposition of a criminal conviction or imprisonment. There is, however, a need for more significant monetary penalties to deter tax agents and BAS agents from contravening the civil penalty provisions in the Bill.

4.10 In addition, civil penalties may be more appropriate than suspension or termination of registration in circumstances where an agent has engaged in conduct prohibited by the Bill, which, although serious, does not warrant the loss of the agent's livelihood.

Summary of new law

Civil penalties

4.11 Entities are liable to pay a pecuniary penalty for contravening a civil penalty provision (civil penalties) for engaging in the following conduct without registration:

- providing a tax agent service or BAS service for a fee or other reward;
- advertising the provision of a tax agent service or BAS service; or
- representing themselves to be a tax agent or BAS agent.

(Refer to paragraphs 2.14 to 2.19 and 2.28 to 2.42 in Chapter 2 of this explanatory memorandum for an explanation of the definitions of 'tax agent service' and 'BAS service'.)

4.12 There are exemptions from liability to civil penalties for certain unregistered entities providing (for a fee or other reward) or advertising tax agent services or BAS services as legal services in certain circumstances. These services are referred to as 'exempted legal services' in this chapter.

4.13 Tax agents and BAS agents are liable to civil penalties for the following serious misconduct:

- making a false or misleading statement to the Commissioner of Taxation (Commissioner);
- employing or using the services of a deregistered entity; or

- signing a declaration or statement in relation to a taxpayer on a document that was not prepared by a registered entity or an individual under the supervision and control of a registered entity.

4.14 The maximum amount of civil penalties for individuals for engaging in prohibited conduct ranges from 50 penalty units to 250 penalty units. Bodies corporate are subject to a penalty that is five times the penalty imposable on an individual, and therefore ranges from 250 penalty units to 1,250 penalty units.

4.15 If a partnership contravenes a provision of the Bill imposing a civil penalty, each partner that was in the partnership at the time of the contravention is treated as though they have contravened the provision, unless they prove otherwise. The maximum amount of civil penalties for each individual partner is the same as for individuals for engaging in prohibited conduct, and therefore ranges from 50 penalty units to 250 penalty units. Similarly, the maximum amount of civil penalties for each corporate partner is the same as for bodies corporate for engaging in prohibited conduct, and ranges from 250 penalty units to 1,250 penalty units. The maximum amount of civil penalties for a partnership depends on the number and type of contravening partners in the partnership.

4.16 If the Board believes an entity has contravened a provision of the Bill imposing a civil penalty, it may apply to the Federal Court for an order requiring the entity to pay the Commonwealth the civil penalty.

Injunction

4.17 If the Board is satisfied that an entity is engaging in conduct that contravenes a civil penalty provision, for example, engaging in conduct that is prohibited without registration, it may apply to the Federal Court for an injunction to restrain or require certain conduct.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Unregistered entities are liable to a civil penalty if they provide a tax agent service or BAS service for a fee or other reward, or if they advertise or represent themselves to be a tax agent or BAS agent.	Unregistered entities are liable for a criminal penalty if they provide any of a specified list of services for a fee, or if they advertise income tax related services or represent themselves to be a tax agent.

<i>New law</i>	<i>Current law</i>
Tax agents and BAS agents are liable for a civil penalty if they make a false or misleading statement or employ or use the services of a deregistered entity in certain circumstances.	No equivalent. (The state Tax Agents' Boards have discretion to suspend or cancel the registration of a tax agent if they are satisfied that any return prepared by the tax agent is false in any material particular.)
Tax agents and BAS agents are liable to a civil penalty if they sign a declaration or other statement in relation to a taxpayer on a document that was prepared by an unregistered entity without supervision and control by a registered entity.	A criminal offence imposes a criminal penalty on a tax agent who allows a person other than an employee, a partner or another tax agent to prepare or conduct business relating to an income tax return or objection on their behalf.
The Board may apply to the Federal Court for an order for a civil penalty if an unregistered entity or a tax agent or BAS agent has contravened a provision of the Bill imposing a civil penalty.	No equivalent. (The Commissioner may initiate criminal proceedings if an unregistered entity or a tax agent contravenes a provision imposing a criminal penalty.)
If a partnership contravenes a civil penalty provision, each partner in the partnership, at the time of the conduct constituting contravention, is liable to pay a civil penalty unless the partner proves that they did not engage in, aid, abet, counsel or procure the conduct, or were in any way concerned in, or party to, the conduct.	No equivalent.
The Board may apply to the Federal Court for an injunction to prevent or compel certain action.	No equivalent.

Detailed explanation of new law

Civil penalties for prohibited conduct

4.18 The Board may apply to the Federal Court for an order requiring an unregistered entity, a tax agent or a BAS agent to pay a civil penalty for engaging in certain specified misconduct. (The procedure for obtaining a civil penalty order is explained in detail from paragraph 4.59.)

Conduct by an unregistered entity

4.19 Subdivision 50-A provides that an unregistered entity is liable to a civil penalty if it:

- provides a tax agent service or BAS service for a fee or other reward in circumstances where it knows or is reasonably expected to know that such a service is a tax agent service or BAS service;
- advertises that it will provide a tax agent service or BAS service; or
- represents that it is a tax agent or BAS agent.

[Subdivision 50-A]

4.20 Exemptions from liability are provided for entities providing exempted legal services and for customs brokers in certain circumstances. These exemptions are explained in paragraphs 4.39 to 4.44.

4.21 The maximum amount of the civil penalty for providing a tax agent service or BAS service for a fee if unregistered is 250 penalty units (currently \$27,500) for an individual and 1,250 penalty units (currently \$137,500) for a body corporate. ('Penalty unit' has the meaning given by section 4AA of the *Crimes Act 1914*.) ***[Subsections 50-5(1) and (2) and 90-1(1)]***

4.22 The maximum amount of the civil penalty for advertising the provision of a tax agent service or BAS service or representing as a tax agent or BAS agent if unregistered is 50 penalty units (currently \$5,500) for an individual and 250 penalty units (currently \$27,500) for a body corporate. ***[Subsections 50-10(1) and (2) and section 50-15]***

4.23 Refer to paragraphs 4.67 to 4.69 for an explanation of the treatment of partners in a partnership in the case of contravention of a civil penalty provision.

Misconduct by a tax agent or BAS agent

4.24 Subdivision 50-B provides that a tax agent or BAS agent is liable to a civil penalty if it:

- makes a false or misleading statement to the Commissioner;
- employs or uses the services of a tax agent or BAS agent who has had their registration terminated in certain circumstances; or

- signs a declaration or statement on a document that has been prepared by an entity other than an individual who is a tax agent or BAS agent, or an individual working under the supervision and control of another individual who is a tax agent or BAS agent.

[Subdivision 50-B]

4.25 The maximum amount of the civil penalty per offence by a tax agent or BAS agent is 250 penalty units (currently \$27,500) for an individual and 1,250 penalty units (currently \$137,500) for a body corporate — refer to paragraph 4.69 for the treatment of partners.
[Section 50-20 and subsections 50-25(1) and 50-30(1) to (4)]

Conduct prohibited without registration

Providing a tax agent service or BAS service for reward if unregistered

4.26 To ensure tax agent services and BAS services are provided to the required standard, there are restrictions on who is entitled to provide these services. Only a tax agent is allowed to provide a tax agent service (other than a BAS service or exempted legal service) for a fee or other reward.

4.27 An entity that is not registered as a tax agent is liable for a civil penalty if it provides a service that it knows or ought reasonably to know is a tax agent service (other than a BAS service or an exempted legal service) and charges or receives a fee or other reward for that service.
[Subsection 50-5(1)]

4.28 An entity is liable for a civil penalty if it provides a service that it knows or ought reasonably to know is a BAS service (other than an exempted legal service) for a fee or other reward and it is not registered as a tax agent or a BAS agent, or, if the BAS service relates to imports or exports to which an indirect tax law applies, the entity is not a customs broker licensed under Part XI of the *Customs Act 1901*. *[Subsection 50-5(2)]*

4.29 The requirement that tax agent services or BAS services be provided ‘for a fee or other reward’ allows employees (who are unregistered) to provide tax agent services or BAS services to their employer/s for a salary, wage or other benefit (such as a fringe benefit as defined under the *Fringe Benefits Tax Assessment Act 1986*) without contravening the civil penalty provision.

4.30 As for tax agents, an employee whose job entails the provision of BAS services to their employer will not be required to register as a BAS agent.

Example 4.1

Kylie, a bookkeeper, is employed by a business in her local area. Kylie is paid a salary and her work involves preparing and reconciling goods and services tax and pay as you go control accounts and the preparation of BASs from these accounts.

Kylie is not required to register as a BAS agent as she is an employee of the business, and is paid a salary for her work and not a fee.

4.31 A service is taken to be provided for a fee even if the fee for the tax agent service or BAS service is bundled with other fees for other services.

Example 4.2

Gerry is a financial services licensee licensed under the *Corporations Act 2001* to provide a range of financial services. Gerry is not a registered tax agent.

One of Gerry's major clients, Petrol Evans Pty Ltd, is about to sell its wholesale petroleum distributorship which comprises a considerable amount of land acquired before 20 September 1985 as well as land, fixtures and goodwill acquired after that time. The company's owner, Larry, seeks Gerry's advice on how the proceeds from a sale of all the distributorship's assets should be invested.

While providing the financial services, Gerry holds himself out to have significant tax expertise and provides tax advice to Larry that Petrol Evans Pty Ltd will be able to shelter any tax on any gain arising from the sale of the distributorship under the small business capital gains tax (CGT) concessions. He does not advise Larry to seek confirmation from a registered tax agent.

In this case, because Gerry held himself out as a tax expert, it is reasonable to expect that Larry would rely on this tax advice not only to determine the proceeds from the sale of the distributorship's assets for investment purposes, but also to claim an entitlement under a taxation law (eg, the small business CGT concessions) in Petrol Evans Pty Ltd's income tax return, without consulting a registered tax agent.

Being a financial services licensee, Gerry ought to know what type of services he is licensed to provide and that the tax advice he provided is a tax agent service. As such, Gerry contravenes the civil penalty provision and is liable for a civil penalty if he charges a fee for the provision of the CGT advice. Gerry is taken to have charged a fee for the CGT advice even if he bundles the fees for the CGT advice with his fees for the financial advice.

4.32 The inclusion of ‘or other reward’ ensures that situations where services are provided for a reward other than a financial reward (eg, by bartering tax agent services for goods or other services) may be within the scope of the civil penalty provision. Also, future benefits (eg, such as future business, sales or commission) may constitute a ‘reward’. For example, providing tax agent services at no charge as a means of attracting or retaining clients may constitute the provision of tax agent services for a reward.

Example 4.3

AdvanceTaxation is a recognised professional association. In an effort to improve the technical proficiency of its members, AdvanceTaxation sets up a technical helpline to advise its members on any difficult tax technical issues in relation to their clients’ tax affairs, and answer any related queries. The advice provided by the helpline is often specific to a taxpayer’s factual circumstances (rather than merely general advice about the law, such as signpost-type advice). AdvanceTaxation markets the service in such a way that it is reasonable to expect its members to rely on the advice obtained for the purpose of satisfying their clients’ obligations or claiming entitlements on behalf of their clients under the taxation laws. Although a fee is not separately charged to members for this service, this is part of a package of services that AdvanceTaxation offers to members as a way of differentiating itself from other recognised professional associations. In this case, AdvanceTaxation would be providing tax agent services for a fee or other reward, and therefore needs to be registered as a tax agent.

4.33 An unregistered contractor contravenes this civil penalty provision if it provides tax agent services or BAS services to tax agents or BAS agents for a fee — refer to paragraphs 2.34 and 2.35 in Chapter 2 of this explanatory memorandum for the application of the definitions of ‘tax agent service’ and ‘BAS service’ to these circumstances and to paragraphs 3.42 to 3.44 in Chapter 3 for an explanation of circumstances where unregistered entities may provide services on behalf of an agent.

Example 4.4

ZARA Service Trust employs and supplies professional staff as contractors to Thomas & Partners (which is a registered tax agent and provides tax agent services for a fee). ZARA Service Trust charges a fee for providing services, via the professional staff, to Thomas & Partners. The arrangement between ZARA Service Trust and Thomas & Partners is such that it is reasonable to expect that Thomas & Partners or its clients would rely on the services provided by the employees of ZARA Service Trust to satisfy obligations or claim entitlements under the taxation laws, and Thomas & Partners does not check or review the work performed by the professional staff.

Because ZARA Service Trust is providing tax agent services to Thomas & Partners for a fee, in order to avoid a civil penalty, at least one of the trustees of ZARA Service Trust must be a registered tax agent, and that trustee must ensure the services provided by ZARA Service Trust on their behalf are provided competently.

Example 4.5

XC Pty is not registered as a tax agent. XC Pty employs Bob as its tax manager. Bob provides assistance and advice in respect of tax matters through a shared services arrangement to other companies within the same wholly owned group as XC Pty. The services are provided on a request basis, and XC Pty charges a fee to recover the costs it incurs in providing the services. The related companies rely on the advice provided by XC Pty through Bob and do not generally consult a registered tax agent on the accuracy of the advice provided.

XC Pty is in breach of the civil penalty provision for providing the services for a fee to related companies while unregistered.

4.34 The civil penalty only applies where an unregistered entity that provides a service *knows* or *ought reasonably to know* that the service is a tax agent service or BAS service. Whether or not an entity ought reasonably to know that a service that they are providing is a tax agent service will depend on the particular circumstances. This provision ensures that entities that take reasonable care, but provide a tax agent service or BAS service inadvertently, will not incur the penalty.

[Paragraphs 50-5(1)(a) and (2)(a)]

Example 4.6

Sarah is a law student. At a family gathering, she is approached by her Uncle for some tax advice. Sarah provides advice based on what she learned as part of her law studies. Her Uncle is really grateful and gives Sarah a gift which she gladly accepts. Sarah offers further help with any other tax related questions her Uncle may have. In this case, if the service is a tax agent service, it is not reasonable for Sarah to know that she is unlawfully providing a tax agent service for a fee or other reward. Sarah is therefore not in contravention of the civil penalty provision.

Advertising a tax agent service or BAS service if unregistered

4.35 An entity is liable for a penalty if it advertises that it will provide a tax agent service (other than a BAS service, or an exempted legal service) and it is not a tax agent. *[Subsection 50-10(1)]*

Example 4.7

John is a registered BAS agent. He advertises in the local paper that he is able to prepare BAS and other income tax forms for individuals and business. As John is registered as a BAS agent, he is not entitled to advertise tax agent services including the preparation of income tax forms. He is liable for a penalty for unlawfully advertising tax agent services.

4.36 An entity is liable for a penalty if it advertises that it will provide a BAS service (other than an exempted legal service) and it is not a tax agent or BAS agent, or, if the BAS service relates to imports or exports to which an indirect tax law applies, it is not a customs broker licensed under Part XI of the *Customs Act 1901*. [Subsection 50-10(2)]

Example 4.8

Ronald has been a bookkeeper for the past five years. Ronald advertises in the local paper that he is able to prepare BAS for small businesses. Unless he is registered, Ronald is liable for a penalty.

4.37 An entity is not liable for a civil penalty if it advertises that it will provide a tax agent service or a BAS service and those services would be provided on a voluntary basis under a scheme approved by the Commissioner by notice published in the *Commonwealth of Australia Gazette*. A notice given by the Commissioner in these circumstances is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. [Paragraphs 50-10(1)(e) and 50-10(2)(e) and subsection 50-10(5)]

Example 4.9

Mai, a retired tax agent, prepares the income tax returns of pensioners and newly arrived immigrants on a voluntary basis as part of the Tax Help Program, a scheme published in the *Commonwealth of Australia Gazette*, approved by the Commissioner and run by the Australian Taxation Office (ATO). As a result, Mai, although unregistered, is permitted to advertise that she will provide tax agent services as part of the Tax Help Program and she is not liable for a penalty.

Representing that you are a tax agent or BAS agent if unregistered

4.38 An entity is liable for a civil penalty if it represents that it is a tax agent or BAS agent, or both, and that representation is untrue. [Section 50-15]

Example 4.10

Alberto was once a registered tax agent, but let his registration lapse several years ago. Alberto continues to distribute business cards stating that he is a tax agent. Alberto is therefore liable for a penalty for representing himself as a tax agent when unregistered.

Exemption from liability for providing or advertising certain legal services

4.39 Entities such as legal practitioners may provide or advertise tax agent services in certain circumstances without being registered as a tax agent or BAS agent.

4.40 Exemptions from liability to civil penalties apply to unregistered entities that are permitted to provide legal services under a state or territory law regulating legal practice and the provision of legal services (ie, the Legal Profession Acts of the states and territories).

4.41 If an entity is permitted to provide a tax agent service or BAS service (other than the preparation and lodgment of a return or a return-like statement such as a BAS, instalment activity statement, superannuation guarantee statement or pay as you go withholding payment summary statement) as a legal service under a state or territory Legal Profession Act, it may charge a fee or advertise without being registered as a tax agent or BAS agent. *[Subsections 50-5(1) to (4) and 50-10(1) to (4)]*

4.42 These entities may also prepare and lodge returns or return-like statements for a fee or advertise such services if the entity provides or would provide the service in the course of acting for a trust or deceased estate as a trustee or legal personal representative. *[Subsections 50-5(3) and (4) and 50-10(3) and (4)]*

Example 4.11

Philip has information about an investment opportunity which advertises significant tax deductions. He contacts his solicitor, Bryce, who is an Australian legal practitioner as defined under the relevant Legal Profession Act but not a registered tax agent, to obtain taxation advice on the investment (this service does not involve preparation or lodgment of a return or statement). Although Bryce provides a tax agent service for a fee, he is not liable for a civil penalty as he is permitted to provide the tax agent service as a legal service under the relevant Legal Profession Act.

Example 4.12

Toby & Co. is an incorporated legal practice and not a registered tax agent. Toby & Co. is permitted under the relevant Legal Profession Act to provide legal services. Toby & Co. provides a range of tax agent services to its clients for a fee, including preparation and lodgment of returns in some cases. Toby & Co. is in breach of the civil penalty provision unless it prepares and lodges returns for its clients only in the course of acting for a trust or deceased estate as a trustee or legal personal representative.

4.43 Where an entity described in paragraphs 4.39 to 4.42, in the course of civil penalty proceedings for charging a fee or other reward while unregistered, seeks to rely on the fact that it prepared and lodged returns or return-like statements as a legal service and for a fee because it was acting for a trust or deceased estate as trustee or legal personal representative, the entity bears an evidential burden in relation to that matter. This is because only the entity providing the service has this knowledge. *[Subsection 50-5(5)]*

Other exemptions

4.44 Customs brokers licensed under the *Customs Act 1901* are not liable for a civil penalty if the BAS service they provide or advertise that they will provide relates to imports or exports to which an ‘indirect tax law’ (as defined in section 995-1 of the *Income Tax Assessment Act 1997*) applies. *[Paragraphs 50-5(2)(e) and 50-10(2)(d)]*

Serious misconduct prohibited while registered

Making a false or misleading statement

4.45 A tax agent or BAS agent must not prepare or certify a statement (or permit another person to do so) that they know, or ought reasonably to know, is likely to be made to the Commissioner, in circumstances where they know, or are reckless as to whether, the statement:

- is false, incorrect or misleading in a material particular respect; or
- omits any matter without which the statement is misleading in a material respect.

[Section 50-20]

4.46 Given that the Code of Professional Conduct (Code) requires tax agents and BAS agents to take reasonable care in their provision of tax agent services and therefore addresses circumstances where the agent is

careless in making a statement (eg, see paragraph 3.47 in Chapter 3 of this explanatory memorandum), this civil penalty provision only applies to making a false or misleading statement knowingly or recklessly.

4.47 If a tax agent or BAS agent has reason to believe that their client's records are incorrect or misleading, to avoid exposure to a civil penalty the agent may:

- discuss the matter with the client to clarify any possible misstatement or omission;
- advise the client to disclose the misstatement or omission to the ATO if the relevant documents have already been submitted; and/or
- withdraw from the engagement if the client, after having been advised, refuses to explain or correct any apparent misstatement or omission.

Example 4.13

Tyler is a registered BAS agent and is completing a BAS statement for Eddie, his client. Eddie instructs Tyler to record \$2,000 as the amount withheld from his employees' salaries during the quarter. On reviewing Eddie's records, Tyler finds that Eddie has in fact withheld \$5,000 from his employees' salaries. When queried, Eddie states that he has had unexpected expenses for the past quarter and therefore intends to record only \$2,000 of the withheld amount in this BAS and the remaining \$3,000 in the next quarter. Tyler would be knowingly making a false statement if he continues with Eddie's request.

Because Eddie insists that the misstatement be made and Tyler is unable to resolve the issue, to avoid a civil penalty Tyler resigns from the engagement.

Employing a tax agent or BAS agent whose registration has been terminated

4.48 A tax agent or BAS agent must not provide tax agent services for a fee or other reward where its registration has been terminated by the Board.

4.49 Extending this principle, a tax agent or BAS agent must not employ or use 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 registered and had its registration terminated less than one year ago.

[Subsection 50-25(1)]

Example 4.14

Frank is a registered tax agent with a large client base. Due to his heavy workload he decides to employ his friend Cheryl to assist with the preparation of tax returns. Frank is aware that Cheryl had previously been a registered tax agent, and that her registration was terminated by the Board the previous year as a result of a conviction for fraudulent activities.

Frank is liable to a civil penalty for employing a person whose registration has been terminated within one year of the employment.

4.50 However, a tax agent or BAS agent is not liable for a civil penalty if it employs or uses the services of an entity whose registration was terminated as a result of the entity surrendering its registration or becoming an undischarged bankrupt or going into external administration, or because of a reason prescribed by the regulations under the Bill.

[Subsection 50-25(2)]

4.51 These exemptions from penalty cater for entities whose registration was terminated for reasons not involving serious misconduct by the entities. For example, it would be unfair for an entity that surrendered its registration or an individual who became bankrupt (eg, as a result of their position as guarantor for a loan) to automatically be prevented from providing tax agent services for another entity.

4.52 This civil penalty provision does not apply to tax agents or BAS agents who employ or use the services of an entity whose registration has lapsed as, in such a case, the entity's registration was not terminated.

4.53 To facilitate compliance with this civil penalty provision, details of certain deregistered tax agents and BAS agents must be maintained on the Board's website — refer to paragraphs 5.126 to 5.129 in Chapter 5 of this explanatory memorandum.

4.54 The prohibition only applies to the employment or use of a deregistered entity during the year following termination. This is to ensure an entity is not prevented from operating in the tax industry for an indeterminate period.

Signing of a declaration or other statement in certain circumstances

4.55 Broadly speaking, a tax agent or BAS agent is liable for a civil penalty if they sign a declaration or other statement in relation to a taxpayer that is required or permitted by a taxation law (or by a BAS provision for BAS agents), where the document that the declaration or statement relates to was prepared by an unregistered entity without supervision and control (which includes, but is not limited to, an employment relationship) by a registered entity.

4.56 For registered individuals, a civil penalty applies if:

- a tax agent signs a declaration or other statement in relation to a taxpayer that is required or permitted by a taxation law (other than a BAS provision), and the document that the declaration or statement relates to was not prepared by:
 - the tax agent;
 - an individual working under the supervision and control of the tax agent;
 - another tax agent who is an individual; or
 - an individual working under the supervision and control of another tax agent who is an individual;
[subsection 50-30(1)] and/or
- a tax agent or BAS agent signs a declaration or other statement in relation to a taxpayer that is required or permitted by a BAS provision, and the document that the declaration or statement relates to was not prepared by:
 - the tax agent or BAS agent;
 - an individual working under the supervision and control of the tax agent or BAS agent;
 - another tax agent or BAS agent who is an individual; or
 - an individual working under the supervision and control of another individual who is a tax agent or BAS agent.
[Subsection 50-30(2)]

4.57 For registered partnerships and companies, a civil penalty applies if:

- a tax agent signs a declaration or other statement on a document in relation to a taxpayer that is required or permitted by a taxation law (other than a BAS provision), and the document that the declaration or statement relates to was not prepared by:
 - a tax agent who is an individual; or
 - an individual working under the supervision and control of another individual who is a tax agent;
[subsection 50-30(3)] and/or
- a tax agent or BAS agent signs a declaration or other statement on a document in relation to a taxpayer that is required or permitted by a BAS provision, and the document that the declaration or statement relates to was not prepared by:
 - a BAS agent who is an individual;
 - a tax agent who is an individual; or
 - an individual working under the supervision and control of another individual who is a tax agent or BAS agent.
[Subsection 50-30(4)]

4.58 A tax agent or BAS agent is not liable for a civil penalty if they sign a declaration or other statement that relates to a document which was prepared by an entity other than those listed above, including an unregistered entity which is not supervised and controlled by a registered entity, provided they have taken reasonable steps to ensure the accuracy of the document before signing it. The taking of reasonable steps could be demonstrated by evidence that the agent reviewed the document before signing it or by evidence of appropriate alternative review or monitoring arrangements. In this regard, the agent bears an evidential burden in relation to that matter. *[Subsection 50-30(5)]*

Example 4.15

Hans, who is not registered to provide tax agent services, has prepared a number of income tax returns for a fee. He arranges for his friend, Joel, a registered tax agent, to sign and submit these income tax returns in exchange for providing Joel with a share of his profits. The returns contain significant errors as Joel did not review Hans' work or otherwise ensure their accuracy prior to signing the returns.

Joel is liable for a civil penalty for signing a tax return that was not prepared by him, another registered tax agent, or a person working under his or another tax agent's supervision and control. He is not exempt from the civil penalty because he cannot demonstrate that he took reasonable steps to ensure the accuracy of the returns before signing and submitting them.

Hans is also liable for a civil penalty for providing tax agent services for a fee while unregistered.

Obtaining an order for a civil penalty and recovery of a penalty

Order to pay a pecuniary penalty for contravening a civil penalty provision

4.59 If an entity contravenes a provision of the Bill imposing a civil penalty, the Board may apply to the Federal Court within four years of the contravention for an order that the entity pays the Commonwealth a pecuniary penalty. *[Subsection 50-35(1)]*

4.60 The application must be made by the Board, on behalf of the Commonwealth. Although applications for civil penalty orders are more commonly made to the Federal Court by Commonwealth public officials (and, generally, by Ministers), in this case, it is appropriate for the Board — rather than any Commonwealth public official — to make such applications to preserve the Board's independence in the exercising of its functions and powers in regulating the provision of tax agent services. Appropriate accountability for, and transparency of, decisions to make such applications is provided through the requirement that the Board report annually to the Parliament, via the Minister, on its operations — refer to paragraphs 5.123 to 5.125 in Chapter 5 of this explanatory memorandum.

4.61 The four-year limitation for commencing proceedings is consistent with other instances in the taxation laws where a civil penalty is the appropriate remedy (eg, the civil penalties for the promotion and implementation of schemes in Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953)).

4.62 The Board is not required to apply to the Federal Court for an order for every contravention of a civil penalty provision in the Bill. For example, isolated, technical contraventions may not warrant the Board taking action in the Federal Court.

4.63 If the Federal Court is satisfied that the entity has contravened a civil penalty provision, it may order the entity to pay a pecuniary penalty to the Commonwealth for each contravention of that provision. The amount of the penalty is determined by the Federal Court and is payable for each contravention, but the penalty for each contravention must not exceed the amount specified in the relevant civil penalty provision. (The maximum penalty amounts are explained in paragraphs 4.18 to 4.25.)
[Subsection 50-35(2)]

4.64 Where conduct contravenes two or more civil penalty provisions, then proceedings may be commenced against the entity for contravention of any or all of those provisions. However, an entity is not liable for more than one pecuniary penalty for the same instance of misconduct (ie, the entity may be penalised for contravening only one of the civil penalty provisions, where conduct contravenes more than one provision). *[Subsection 50-35(3)]*

4.65 A contravention of a provision of the Bill imposing a civil penalty is not an offence. That means that a contravention is not a violation of the criminal law.

Recovery of a pecuniary penalty

4.66 If the Federal Court orders an entity to pay a pecuniary penalty, then the penalty is payable to the Commissioner, who receives the penalty on behalf of the Commonwealth. The Commissioner may enforce the order on behalf of the Commonwealth as if it were a judgment of the Federal Court. If the entity does not remit the penalty, then it will be held in contempt of court and may be subject to further proceedings.
[Section 50-45]

Treatment of partnerships

4.67 For the purposes of the Bill, a change in the composition of a partnership does not affect the continuity of the partnership. However, where a partnership contravenes a civil penalty provision in the Bill, only those partners that were in the partnership at the time of the misconduct may be liable to pay a civil penalty. The civil penalty will not apply to those partners that can prove, on the balance of probabilities, that they:

- did not engage in the conduct;

- did not aid, abet, counsel or procure the conduct; and
- were not in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or by any act or omission of the partner).

[Subsection 50-40(1) and section 70-20]

4.68 This provision is modelled on subsection 444-30(4) of Schedule 1 to the TAA 1953, which applies to criminal offences in certain taxation laws. The provision deems a partner that was in a partnership at the time of the misconduct to be liable to a civil penalty if the partnership is liable. The rationale for this provision is that it may be difficult for the Board to determine which partner is responsible for a particular misconduct, such as where the partnership employs or uses the services of a deregistered entity.

4.69 In circumstances where a partnership consists of both individual and corporate partners, individual partners are subject to a penalty up to the maximum for individuals when they are in breach of a civil penalty provision (being one fifth of the maximum imposable on a body corporate), and corporate partners are subject to a penalty up to the maximum for a body corporate.

Example 4.16

KKB Services is a partnership providing bookkeeping services, but is not a registered BAS agent. In this partnership, Kristel is an individual partner, and Hood Services Ltd is a corporate partner, and neither partner is a registered agent. The partnership advertises in the local phone directory that its business prepares BAS and provides advice in relation to BAS provisions.

KKB Services is found by the Federal Court to have breached the civil penalty provision that prohibits unregistered entities from advertising that they provide BAS services. Because the partners are different types of entities, the civil penalties for the partners are different. Hood Services Ltd is liable for five times the amount for which Kristel is liable.

Kristel was able to prove that she did not engage or knowingly assist in the conduct of advertising the provision of BAS services, and was not liable for the civil penalty.

Injunction

4.70 Whilst an application to the Federal Court for a civil penalty order may result in an entity being penalised financially, there is no

guarantee that the penalty will change the entity's behaviour. In such circumstances, the Board may apply to the Federal Court for an injunction to prevent or compel certain action.

4.71 The Federal Court may grant an injunction against an entity on such terms as it considers appropriate. It may grant an injunction restraining an entity from engaging, or continuing to engage, in an activity or grant an injunction requiring the entity to do something if it is satisfied that the entity has not done that thing and/or is likely not do the thing required without compulsion.

4.72 An injunction may be granted if the Federal Court is satisfied that a tax agent or BAS agent has engaged in the past, or is proposing to engage in the future, in conduct that would constitute a contravention of a civil penalty provision in this Bill. *[Subsection 70-5(1)]*

Example 4.17

Felix was a registered tax agent, however the Board recently terminated his registration due to a serious breach of the Code. Although Felix's registration has been terminated, he continues to advertise the provision of tax agent services (for a fee) in the local newspaper and continues to act for many of his former clients.

The Board could apply to the Federal Court for a civil penalty order against Felix or an injunction prohibiting Felix from advertising these services and acting for others, or both.

4.73 Injunctions can be used as an alternative to civil penalty proceedings or in addition to them if the Federal Court considers the circumstances of a case warrant both injunctive relief and a civil penalty order.

4.74 Before deciding the Board's application, the Federal Court may also choose to grant an interim injunction. *[Subsection 70-5(2)]*

4.75 The ability to seek injunctions and interim injunctions allows the Board to take immediate action against entities which engage in conduct prohibited by this Bill, limiting the period during which they can engage in such conduct.

4.76 The Commonwealth may provide an undertaking to pay damages for the losses that an entity suffers due to the granting of an interim injunction if it turns out to be unjustified.

Chapter 5

The Tax Practitioners Board and its role

Outline of chapter

5.1 Part 6 of this Bill establishes a national Tax Practitioners Board (Board) and creates a framework for the conduct of investigations by the Board.

5.2 Specifically, Part 6 of the Bill provides that the Board is responsible for:

- registration of tax agents and Business Activity Statement (BAS) agents;
- conducting investigations and imposing sanctions for breaches of the Code of Professional Conduct (Code) where necessary; and
- other functions that are incidental to the above responsibilities or are prescribed in the regulations.

5.3 Paragraph 70-10(i) of the Bill provides that a decision to extend the period of time within which an investigation is to be completed is reviewable by the Administrative Appeals Tribunal (AAT).

5.4 Subdivision 70-D of the Bill provides that the Board may delegate certain functions and powers to others and that Board members and committee members, both past and current, are immune from legal action for things done in good faith in the performance of the Board's functions or the exercise of the Board's powers.

5.5 Sections 70-35 to 70-45 of the Bill are the secrecy and disclosure provisions governing the use of information acquired under the Bill.

5.6 Section 70-50 of the Bill provides that the Bill does not affect the law relating to legal professional privilege.

Context of amendments

Operation of current provisions

5.7 Currently, the six state Tax Agents' Boards (state Boards) operate somewhat independently of one another. Each administers registration processes, disciplinary processes, investigations and evidence gathering activities in accordance with the same law, but may employ different administrative processes.

5.8 The separation of the state Boards has increased the risk of inconsistencies in the regulation and standards of tax agents, particularly in the administration of tax agent registrations and the handling of complaints and disciplinary matters.

5.9 Furthermore, while the current law provides for a Treasury Portfolio Minister to appoint members to each state Board, it does not:

- stipulate duration of appointments;
- provide for a person once appointed to resign; or
- provide for the removal of Board members for cause.

5.10 Other deficiencies in the current system include:

- The state Boards are not required to report on their activities to the Minister or to the Parliament.
- The state Boards' powers are narrowly defined without sufficient flexibility to accommodate various circumstances.
- There is no statutory requirement for the conduct of investigations and disciplinary proceedings by the state Boards.
- The state Boards can apply different interpretations to similar circumstances in different states.
- The current administrative arrangements between the state Boards and the Australian Taxation Office (ATO) blur the responsibilities of the state Boards and the ATO. Both tax agents and taxpayers often regard the state Boards as merely an arm of the ATO.

Rationale for major changes

5.11 Part 6 of the Bill defines the role, functions, powers and reporting obligations of the Board. The primary purpose of Part 6 is to establish a single national board to register and regulate tax agents and BAS agents, with the powers to perform its functions effectively and the flexibility to allocate resources appropriately.

5.12 The new framework makes the responsibilities of the Board for investigations related to, and enforcement of, the law explicit. It provides for the Board to gather information and to hear and decide on complaints against tax agents and BAS agents. The investigation and enforcement role of the Board aims to ensure that agents comply with their obligations to their clients and the broader community.

5.13 The Board will be composed of a sufficient number of members to allow it to undertake its statutory functions and exercise its powers at a national level. All stakeholders within the system will benefit from the Board providing an efficient and effective national system of regulation and administration, with the flexibility to have such regional presence as may be required. This approach eliminates duplication of services and activities and inconsistencies in the interpretation of terms, rules and procedures.

5.14 The Board will be a statutory body that falls within the Treasury portfolio. The statutory functions and powers are vested in the Board independently of any other body including the ATO. Although the secretariat to the Board will be provided by the ATO, the secretariat must take its directions for the administration and operation of the Board from the Board itself.

Summary of new law

5.15 The Bill abolishes the six state Boards and creates a national Board.

5.16 The Board is vested with a number of functions and powers:

- The functions include administration of tax agent and BAS agent registration, investigation and the imposition of sanctions where necessary, and the performance of any other functions prescribed or required by the Bill and anything else incidental to the performance of the functions.

- The Board may do all things necessary for the performance of its functions.
- The Board also has the power to delegate many of its functions and powers to others, to establish committees to assist it and to determine its own procedures.

5.17 The Board consists of a Chair and at least six other members, appointed by the relevant Treasury Portfolio Minister (the Minister), holding office on a part-time or full-time basis.

5.18 A member may resign by notice provided to the Minister. The Minister may terminate the appointment of a member of the Board in certain circumstances.

5.19 A quorum at a Board meeting is constituted by a majority of the members appointed. Questions are decided by a majority of the votes of the Board members present and voting, with the Chair having a casting vote in the case of a deadlock.

5.20 The Board may investigate:

- applications for registration; and
- the conduct of tax agents, BAS agents and unregistered entities that may be in breach of a provision of the Bill.

5.21 The Board may establish a committee of one or more individuals to assist the Board in carrying out its functions and exercising its powers, including performing an investigation on its behalf.

5.22 The Board may compel the provision of information or summon witnesses and compel them to provide information for the purposes of the investigation.

5.23 Following an investigation, the Board must decide what action (if any) to take. (Part 5 of the Bill provides for the enforcement of certain decisions made as a result of an investigation — refer to Chapter 4 of this explanatory memorandum.)

5.24 Information acquired under the Bill may only be disclosed in limited circumstances.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A national Board is established to administer the regulation of tax agent services in all States and Territories, to achieve national consistency and flexible resource allocation.	The current law provides for six state Boards.
The Board has certain statutory functions and powers. It may make decisions following an investigation, may establish committees, and has reporting obligations.	No equivalent.
The Board has the power to compel the provision of information and summon witnesses to supply information to the Board for the purposes of its investigation.	The state Boards' power to summon witnesses and compel persons to supply information is contained in the <i>Income Tax Regulations 1936</i> .
The Board may delegate most of its powers and functions to any person/s that the Board considers appropriate. Decisions that are reviewable by the AAT may only be delegated to a committee that consists of three or more Board members. The Board may not delegate the power to make guidelines or the power to establish committees.	No equivalent.
If the Board decides to investigate a matter and no decision is made within six months of the commencement of an investigation (or within a period extended by the Board in specified circumstances) the Board is taken to have decided to take no further action in relation to the matter.	No equivalent.

Detailed explanation of new law

Functions and powers of the Tax Practitioners Board

Establishment

5.25 The Board is to be established at a time on or after the day on which the Bill receives Royal Assent. [Section 60-5 and subsections 1-5(1) and 90-1(1)]

5.26 Enabling the Board to be established on the day on which the Bill receives Royal Assent allows the Board time to perform preparatory work prior to the commencement of its functions — refer to paragraphs 1.25 to 1.29 in Chapter 1 of this explanatory memorandum for an explanation of the commencement dates of the Bill. The preparatory workload of the Board to effect a smooth transition to the new framework is expected to be significant.

5.27 Although section 4 of the *Acts Interpretation Act 1901* provides for the exercise of certain powers between passage and commencement of an Act, reliance on this provision alone would not allow the members of the Board and committees that it may establish to be remunerated. In addition, some of the preparatory work that the Board may need to perform is likely to fall beyond the scope of section 4 of the *Acts Interpretation Act 1901*.

5.28 The Board has responsibility for regulating the provision of tax agent services in all Australian states and territories by reference to the Code and the system for the registration of tax agents and BAS agents and conduct of investigations set out in the Bill.

5.29 The Board is a statutory authority that falls within the portfolio responsibilities of the Treasurer. It is not itself a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act) and is not a body regulated by the *Commonwealth Authorities and Companies Act 1997* (ie, the Board is neither a prescribed FMA Act agency nor a Commonwealth Authorities and Companies Act body) but is formally part of the ATO, a prescribed FMA Act agency.

5.30 To ensure that the Board has the requisite degree of independence from the ATO, it will be funded via a Special Account (under section 20 of the FMA Act) through the annual appropriation to the ATO. As such, the Board's annual appropriation will be quarantined within the ATO's funding. The Commissioner of Taxation (Commissioner) will provide resources to the Board within the limits of the Special Account.

5.31 In this way the Board will operate with decision-making independence from the ATO, but will rely on the ATO for administrative support. The Board will have available to it the resources necessary to perform its functions up to the amount of its Budget as determined by the Finance Minister. The exact nature of the service relationship and arrangements between the Board and the ATO will be determined through agreements between the two parties. Such agreements are likely to cover a number of issues including resourcing, technical support and legal support.

5.32 In the establishment phase, it is efficient for the Board to sit within the ATO, due to the administrative obligations that would otherwise apply to it as a separate agency and because the ATO provides the most appropriate functional fit for the Board from amongst existing prescribed FMA Act agencies.

5.33 However, this arrangement is intended to be the subject of a post-implementation review to be conducted three years after commencement of the Bill — refer to paragraph 6.71 in Chapter 6 of this explanatory memorandum. The key focus of the review will be to assess whether this arrangement remains appropriate and satisfactory. The review will consider whether the independence of the Board is impaired in any way because of its continued connection with the ATO, and whether an alternative arrangement should be considered.

Functions

5.34 The functions of the Board are to:

- administer the system for the registration of tax agents and BAS agents — registration of agents is discussed in detail in Chapter 2 of this explanatory memorandum;
- investigate applications for registration and conduct that may breach the Bill, including non-compliance with the Code — investigations are discussed in more detail below, and the Code is explained in Chapter 3 of this explanatory memorandum;
- impose administrative sanctions for non-compliance with the Code;
- issue guidelines, which are legislative instruments, to assist in achieving the functions outlined above;
- undertake other functions conferred on the Board by the Bill, the regulations, or any other law of the Commonwealth; and

- do anything else related to the performance of its functions.

[Section 60-15]

5.35 Guidelines issued by the Board are legislative instruments that bind the Board and those to whom they apply. Under the *Legislative Instruments Act 2003*, legislative instruments are generally required to be exposed for consultation with relevant parties, including those proposed to be affected by the instrument. They must be tabled in both Houses of Parliament and entered onto the Federal Register of Legislative Instruments by a specified date.

Powers

General power

5.36 The Board has the power to do all things necessary or convenient to be done to enable it to perform its functions. This gives the Board flexibility in the administration of the system. The Board's powers therefore include, but are not limited to, such things as issuing guidelines to determine the application of the principles of the Code. *[Section 60-20]*

Power to establish committees

5.37 The Board may establish committees, consisting of such person(s) as the Board thinks fit (whether or not Board members), to assist the Board in the performance of its functions and the exercise of its powers. Committees may be formed for a variety of purposes, for example, to assist with investigations, prepare draft guidelines or review training standards. *[Section 60-85 and subsection 90-1(1)]*

5.38 In determining the membership of committees, the Board may seek nominations for membership of committees at a time prior to the commencement of an investigation, thereby establishing a pool of people from which the Board may draw a committee when necessary. Alternatively, the Board may choose to establish committees as and when required, or to establish standing committees for certain matters. Committees do not have to contain or comprise Board members except in situations where a committee is being delegated certain functions or powers which may only be performed by a committee consisting of Board members only — refer to paragraph 5.44.

5.39 A key role for committees is to provide assistance with Board investigations. Having regard to the fact that most investigations will relate to breaches of the Code, the Board will select people with a sound reputation and qualifications and experience relevant to the matters dealt with by the Code. Experienced tax agents may often be appointed to a committee. Similarly, ATO personnel, members of recognised

professional associations and recognised BAS agent associations, members of the legal profession, or professional investigators could be appointed to a committee. (Note, however, that ATO personnel would perform their role as committee members in their capacity as representatives of the Board, not of the ATO.) There may also be occasions where a person with special qualifications, but no specialised knowledge of the taxation laws, will be appointed to a committee.

5.40 A committee may be made up of one person or as many persons as the Board determines necessary or appropriate. For example, where a committee is established to investigate a complaint referring to a relatively minor issue, the Board may choose to investigate the complaint through an individual. On the other hand, where the complaint is of a more complex or serious nature, the Board may choose to appoint a committee with several members.

5.41 Members of committees are remunerated and compensated in the same way as Board members, that is, by determination of the Remuneration Tribunal and/or as prescribed in regulations — refer to paragraphs 5.66 and 5.67 for an explanation of remuneration arrangements for Board members. *[Section 60-90]*

Power to delegate

5.42 The Board has the power to delegate any of its functions and powers to a Board member or a committee, except the following:

- its function of issuing guidelines;
- the power to establish a committee; and
- the power to make decisions that give rise to a right of appeal to the AAT for review of the decision.

[Subsections 70-30(1) and (2)]

5.43 In addition, under section 34AB of the *Acts Interpretation Act 1901*, the Board may not delegate its power to delegate.

5.44 The Board may only delegate its power to make decisions that give rise to a right of appeal to the AAT for review of the decision to a committee that consists of three or more Board members and no non-Board members. *[Subsection 70-30(2)]*

5.45 The Board's ability to delegate certain functions and powers will improve its ability to manage its resources and workload, without exposing it to risk. In particular, functions which do not have the potential to impact significantly on a person's livelihood, such as many of

the routine administrative functions, may appropriately be performed by others.

5.46 Any delegation must be in writing and may be revoked at any time by the Board. A delegation is not affected by a change in the membership of the Board. Therefore, a delegation continues in force even if the membership of the Board changes and may be revoked even if the Board is not constituted by the members who constituted the Board when the delegation was made. *[Subsections 70-30(1) and (4)]*

5.47 In exercising the power that has been delegated, the delegate is subject to the directions of the Board. *[Subsection 70-30(3)]*

Immunity from legal action

5.48 Members or past members of the Board, and members or past members of committees established by the Board to assist it, are immune from legal action in connection with their activities undertaken in good faith as members of the Board or Board committees. No action, suit or proceeding may be brought against such members in relation to anything they do, or fail to do, in good faith in the performance (or purported performance) of the Board's functions or in the exercise (or purported exercise) of the Board's powers. *[Section 70-25]*

Structure of the Tax Practitioners Board

Composition of the Board

5.49 The Board consists of:

- a Chair; and
- at least six other members.

[Subsection 60-10(1)]

5.50 The Bill provides for a minimum of seven Board members. There is no maximum number of Board members.

Appointments and process for appointment

5.51 The Minister is responsible for appointing members of the Board and for appointing one of the members of the Board to be the Chair. Appointments must be in writing. *[Subsections 60-25(1) and (2) and 90-1(1)]*

5.52 The Chair cannot be a member of the Board who holds any office or appointment under a law of the Commonwealth (other than as a

member of the Board) or is appointed or engaged under the *Public Service Act 1999*. This restriction enhances the operational independence of the Board, in particular its independence from the ATO. *[Subsection 60-25(2)]*

5.53 An individual's appointment as a member of the Board is not invalid because of a defect or irregularity in connection with the person's appointment. *[Subsection 60-25(3)]*

5.54 In appointing a Board member, the Minister may determine, in writing, any terms or conditions relating to matters that are not provided for in the Bill. A Board member therefore holds office on the terms and conditions outlined in Part 6 of the Bill — refer to paragraphs 5.59 to 5.71 — and the Minister's determination, if any. *[Section 60-65]*

5.55 Appointment of Board members needs to be consistent with the selection arrangements for statutory appointments which ensure transparent and merit-based assessment in the selection of statutory officeholders. It is expected that a vacancy will be advertised. Candidates for appointment to the Board may be nominated by a recognised professional association, a recognised BAS agent association, the Commissioner or a legal professional association, or may respond of their own accord to an advertised vacancy.

5.56 While it is likely that the Minister will appoint members with an appropriate level of qualifications and experience, relevant to the tax profession, the Minister may appoint a community representative, or a person with special qualifications or experience. The Board represents all segments of the community/industry that it regulates, including the emerging BAS agent industry.

5.57 Although ATO employees (who are appointed or engaged under the *Public Service Act 1999*) may hold Board membership (other than as the Chair — refer to paragraph 5.52), it would be unusual for more than two ATO employees to be appointed to the Board at any one time. The Bill does not require there to be any ATO employees on the Board.

Vacancies

5.58 The performance of the functions or the exercise of the powers of the Board is not affected by a vacancy or vacancies in the membership of the Board. *[Subsection 60-10(2)]*

Duration, basis and terms of office

Duration and basis

5.59 Members of the Board hold office for a period determined by the Minister and specified in the written instrument of appointment.

Members are eligible for reappointment on expiry of the term of appointment. The terms of members of the inaugural Board may be staggered to facilitate a smooth integration of future members and maintain corporate knowledge. *[Section 60-30]*

5.60 Office — including that of the Chair — is held on either a part-time basis or a full-time basis. This flexibility recognises that:

- on the one hand, some Board members hold full-time employment elsewhere, so that a part-time appointment to the Board will not require members to forego their usual employment. Part-time appointment does not prevent Board members from working full-time hours when necessary and convenient. Part-time office provides flexibility around the management of the Board's workload — the workload is expected to be greater during and immediately following the establishment of the Board and the commencement of the rest of the Bill, but is likely to stabilise over time; and
- on the other hand, some applicants for appointment to the Board may only be interested in a full-time appointment.

[Subsection 60-25(1)]

Leave of absence

5.61 Leave of absence (other than recreation leave, in the case of full-time members of the Board) may be granted by the Minister on the terms and conditions determined by the Minister. In practice, it is expected that members' leave of absence arrangements will be determined and agreed as part of the general terms and conditions of appointment. *[Subsections 60-40(2) and (3)]*

5.62 Individuals appointed to the Board on a full-time basis are entitled to recreation leave as determined by the Remuneration Tribunal. *[Subsection 60-40(1)]*

Outside employment and disclosure of interests

5.63 The Bill provides for certain restrictions on engaging in paid employment other than membership of the Board.

5.64 Full-time Board members are prohibited from undertaking paid employment elsewhere without the Minister's approval. Part-time Board members are permitted to hold paid employment elsewhere as long as that employment does not conflict, or have the potential to conflict, with the proper performance of the member's duties on the Board. *[Section 60-45]*

5.65 Board members must disclose, to the Minister in writing, certain direct or indirect pecuniary interests that the member has or acquires. Such interests are those that conflict (or have the potential to conflict) with the proper performance of the Board's functions. Failure, without reasonable excuse, to give written notice of such interests to the Minister may result in the termination of the member's appointment. *[Section 60-50 and paragraph 60-60(1)(c)]*

Remuneration and allowances

5.66 The members of the Board are to be paid:

- such remuneration as is determined by the Remuneration Tribunal;
 - if the Remuneration Tribunal has not made a determination of remuneration, or if such a determination is not in operation, Board members are to be paid such remuneration as is prescribed in regulations; and
- such allowances as are prescribed in regulations.

[Subsections 60-35(1) and (2)]

5.67 Remuneration and allowances are subject to the *Remuneration Tribunal Act 1973*. The Remuneration Tribunal, an independent statutory body, is responsible for determining remuneration and related matters for Commonwealth statutory officeholders and certain other offices, including the Board and its committees. The *Remuneration Tribunal Act 1973* outlines the functions and powers of the Remuneration Tribunal. *[Subsection 60-35(3)]*

Termination of appointment

Resignation by a member

5.68 Ordinarily, a member who wishes to resign from membership of the Board or the Chair who wishes to resign his or her appointment as the Chair will give the Minister written notice of resignation. The notice must specify a date from which the member or the Chair proposes that the resignation will take effect. The Chair may resign his or her appointment as the Chair without also resigning his or her appointment as a member of the Board. *[Section 60-55]*

Termination by the Minister

5.69 The Minister may terminate the appointment of a member prior to the expiry of the member's term on one or more of the following grounds:

- misbehaviour *[paragraph 60-60(1)(a)]*;
- mental or physical incapacity to perform duties *[paragraph 60-60(1)(a)]*;
- the member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors, or makes an assignment of remuneration for the benefit of creditors *[paragraph 60-60(1)(b)]*; or
- the member fails, without reasonable excuse, to comply with the requirement to notify the Minister in writing of any direct or indirect pecuniary interests that conflict or could conflict with the Board's functions *[paragraph 60-60(1)(c)]*.

5.70 Additional grounds for termination of the full-time appointment of a Board member are:

- the member is absent for 14 consecutive days without leave of absence *[paragraph 60-60(2)(a)]*;
- the member is absent for 28 days in any 12-month period without leave of absence *[paragraph 60-60(2)(a)]*; or
- the member engages in paid employment outside his or her duties as a Board member without the Minister's approval *[paragraph 60-60(2)(b)]*.

5.71 Additional grounds for termination of the part-time appointment of a Board member are:

- the member is absent from three consecutive meetings of the Board without leave of absence *[paragraph 60-60(3)(a)]*; or
- the member engages in paid employment that conflicts or could conflict with the proper performance of the duties of office *[paragraph 60-60(3)(b)]*:
 - Employment as a tax agent or BAS agent, or employment in a professional association or the ATO, for example, is

not employment that ordinarily would conflict with the performance of duties as a member of the Board.

Board procedures

Meetings

5.72 The Board may regulate proceedings at its meetings in any way that it considers appropriate. For example, this may include such things as determining the priority and nature of agenda items, circulating an agenda in advance of each meeting, and circulating minutes following a meeting. The Board may also determine its approach to managing conflicts of interest of Board members. *[Subsection 60-70(5)]*

5.73 At a meeting of the Board a quorum is constituted by a majority of Board members appointed. Subsection 33B(3) of the *Acts Interpretation Act 1901* provides explicitly that a member who participates in a meeting via telephone or other means of communication, such as a video-link, is taken to be present at the meeting. *[Subsection 60-70(1)]*

Example 5.1

The Board has eight members. At the time of one of the Board's meetings, two members are absent overseas, one member is absent due to illness, and one further member, Maria, is unable to attend in person due to other commitments. Maria participates in the discussion and decisions made during the meeting via video-link.

There are, therefore, four members present at the meeting and one participating by video-link. In this case, the quorum requirement of five members is met.

5.74 A question arising at a meeting is decided by a simple majority of the votes of the members of the Board present and voting. *[Subsection 60-70(2)]*

5.75 The Chair presides at all meetings at which he or she is present. If the Chair is unable to attend a meeting, the members present must appoint one of themselves to preside. Consistent with the restriction on appointments to the position of Chair, the Board member appointed to preside over a meeting of the Board in the Chair's absence cannot be a member who holds any office or appointment under a law of the Commonwealth (other than as a member of the Board) or a person appointed or engaged under the *Public Service Act 1999*. (This means that a meeting will not be able to proceed in the event that only members who are also engaged or appointed under a Commonwealth law other than the Bill are in attendance. In practice, it is expected that the number of

Board members who are also engaged or appointed under a Commonwealth law other than the Bill will be few, so this situation is unlikely to arise.) *[Subsection 60-70(3)]*

5.76 The Board member presiding at a meeting has a deliberative vote and, in the event of an equality of votes, a casting vote. (A deliberative vote is a vote that expresses an individual's opinion on a matter being deliberated. A casting vote, or deciding vote, is a vote given to the presiding officer in order to resolve a deadlock.) *[Subsection 60-70(4)]*

Decisions without meetings

5.77 A decision can be made in the absence of a meeting if the Board has determined that the decision may be made without meeting and decided the method by which its members are to indicate agreement (or otherwise) with the proposed decision. *[Subsections 60-75(1) and (3)]*

5.78 Once these procedures have been determined, a decision is taken to have been made at a meeting of the Board if:

- all of the members of the Board were informed of the proposed decision, or reasonable efforts were made to inform all the members of the proposed decision; and
- a majority of the Board indicates agreement with the proposed decision in accordance with the method determined by the Board for indicating such agreement.

[Subsection 60-75(2)]

5.79 The purpose of this subsection is to ensure that part-time membership does not inhibit the functioning of the Board, while providing assurance that all Board members have the opportunity to consider and express their opinions on a matter before it is decided.

5.80 The Board must keep a record of all decisions made without meetings. *[Subsection 60-75(4)]*

Administrative support

5.81 The Board secretariat is to be staffed by persons engaged under the *Public Service Act 1999*. The Commissioner is responsible for making the services of such individuals available to the Board. This arrangement will be subject to the post-implementation review — refer to paragraph 5.33. *[Section 60-80]*

5.82 In performing services for the Board, an individual whose services have been made available by the Commissioner is subject to the directions of the Chair of the Board, provided they do not conflict with the requirements of other legislation and guiding rules (eg, the *Public Service Act 1999* and the Australian Public Service Code of Conduct).

5.83 To the extent that an individual is doing things other than assisting with the execution of the Board's statutory functions or powers, the individual is simply acting as an officer of the ATO who is charged with doing things to assist the Board. In these contexts, the individual should be subject to direction by the Commissioner, provided that any particular direction does not hinder the Board's independent performance of its functions or exercise of its powers.

Investigation procedures

5.84 An important function of the Board is to investigate matters relating to alleged or potential breaches of the provisions of the Bill. The investigation procedures outlined in the Bill provide a mechanism for grievances to be heard, ensure that the Board will make considered decisions, and allow for sanctions or penalties to be imposed where appropriate.

5.85 The Board has the power to investigate matters relating to any aspect of its responsibilities, in particular:

- an application for registration as a tax agent or BAS agent;
- any conduct that may be considered to be a breach of the Code or any other section of the Bill; and
- any other matter prescribed by the regulations.

[Subsection 60-95(1)]

Commencing an investigation

5.86 An investigation may arise as a result of a complaint made by a third party (such as a client, an employee of a tax agent or BAS agent, a member of the public or the Commissioner) about an agent's conduct, or the Board may decide to initiate an investigation of its own accord.

5.87 When a complaint is made to the Board, the Board will determine whether the complaint is one of substance and whether an investigation is warranted. To do this, the Board may need to gather preliminary information. It may do this by any means it sees fit, for example, by inquiry of the complainant and/or the tax agent or BAS agent

to whom the complaint pertains, or by requesting and reviewing documentation provided by the complainant, the client, or obtained from the ATO.

5.88 Following its preliminary inquiry, if the Board decides to investigate a matter, it must notify the tax agent, BAS agent, unregistered entity or applicant for registration, as appropriate, in writing, within two weeks after the decision to investigate. The Board is not required to notify the complainant (if any) of its commencement of an investigation, however it may choose to do so. [*Subsection 60-95(2)*]

Example 5.2

Allister is unhappy with the services provided to him by his tax agent Ms Fish, a partner of the registered tax agent Fish & Associates. He raises his concerns with Ms Fish but is not satisfied with the response and complains to the Board.

Leo, an employee of the Board Secretariat, receives Allister's letter of complaint. He commences gathering preliminary information by contacting Ms Fish to discuss Allister's claim. Leo requests copies of relevant documentation from Ms Fish and seeks her view on the complaint. Leo also contacts Allister to advise him that the Board is reviewing his complaint and requests that he provide copies of documentation held by him.

After gathering preliminary information, Leo presents this information to the Board. The Board meets and decides to investigate the matter further. The Board notifies Ms Fish formally that it has decided to investigate the complaint. This notification is made in writing within two weeks after the day on which the Board decided to commence an investigation.

5.89 An investigation is taken to have commenced on the date of the Board's written notice of its decision to investigate. [*Subsection 60-95(3)*]

Example 5.3

The Board receives a complaint against WWW Co., a registered tax agent, on 1 June. Over the course of several months, the Board Secretariat undertakes preliminary inquiries in relation to WWW Co. and recommends to the Board that an investigation be undertaken. The Board considers the recommendation and decides that an investigation is warranted on 15 October. The Board notifies WWW Co. accordingly on 22 October (within two weeks after the decision). The investigation is taken to commence on 22 October rather than 1 June.

Referral of complaints

5.90 Where the Board receives a complaint that an unregistered entity is providing tax agent services or BAS services for a fee or other reward, the Board may conduct an investigation. If the investigation concludes that the unregistered entity was operating unlawfully, the Board may apply to the Federal Court of Australia (Federal Court) for a civil penalty order or an injunction. This is explained in Chapter 4 of this explanatory memorandum.

5.91 The Board may also refer certain matters to other agencies. Under the Bill, Board members may only disclose information they acquire under the Bill in the performance of their duties under or in relation to the Bill. In addition, Board members may disclose information acquired under the Bill to the Commissioner and to certain law enforcement agencies for the purpose of investigating certain criminal offences — refer to paragraphs 5.134 to 5.151 for an explanation of the secrecy and disclosure provisions in the Bill.

Conducting an investigation

5.92 The Board may determine its own procedures for the conduct of investigations. This flexibility allows the Board to conduct investigations in a way that is the most efficient and appropriate in the circumstances.
[Paragraph 60-95(4)(a)]

5.93 The Board may choose to issue or publish guidelines (which are legislative instruments) on the conduct of investigations for the information of committee members, tax agents, BAS agents and applicants for registration.

5.94 In conducting investigations, the Board is not bound by the rules of evidence. Normally, the rules of evidence apply to judicial decision-making processes, not administrative decision making processes. The Board may therefore conduct its investigation with as little formality as feasible and as expeditiously as a proper consideration of the matters of the investigation permits. The investigation process should not be prolonged or overly onerous on the entity being investigated.
[Paragraph 60-95(4)(b)]

5.95 Although the rules of evidence do not apply, the Board is required to use its best judgment in conducting investigations and the rules of evidence may provide the best guide. For example, if a witness declines to verify a statement by oath or affirmation, the Board could be expected to accord that evidence little weight.

5.96 The administrative law principles of natural justice (which include the requirement for procedural fairness) apply to the Board's investigations. This would involve, among other things, giving the entity being investigated the right to be informed of the detail of the complaint and the opportunity — including sufficient time — to be heard in response.

Gathering information

5.97 For the purposes of conducting an investigation, the Board may seek information by notice in writing. It has the power to require a person to:

- provide the Board with the information referred to in the notice *[paragraph 60-100(1)(a)]*;
- provide the Board the documents or things referred to in the notice *[paragraph 60-100(1)(b)]*; and/or
- appear before the Board to give evidence or to produce documents or other things referred to in the notice *[subsection 60-105(1)]*.

5.98 Sections 8C and 8D of the *Taxation Administration Act 1953* (TAA 1953) provide for offences relating to failure to give information, failure to produce records, documents or things, failure to attend, failure to take an oath or make an affirmation, failure to answer questions and other matters when required under a taxation law. Section 8C provides for an absolute liability offence while section 8D provides for a strict liability offence. For strict liability offences, the common law permits a defence of honest and reasonable mistake of fact. Absolute liability offences do not allow such a defence.

5.99 When the Board requests the production of a document or thing, the request must be in writing and must specify the period within which the person must comply with the request. The period specified must be at least 14 days after the date of request to give the person sufficient time to comply without impeding the Board's efficient conduct of its investigations. *[Subsection 60-100(2)]*

5.100 The Board may request information from any person, including ATO officers, for the purpose of an investigation.

5.101 For the purpose of taking evidence, the Chair of the Board, or an individual acting on behalf of the Chair, may require a person to either take an oath or make an affirmation. The oath or affirmation is an undertaking that the evidence to be given is true. For this purpose, the

Chair or individual acting on behalf of the Chair may administer the oath or affirmation. *[Subsections 60-110(1) and (2)]*

5.102 Persons who appear before the Board for the purpose of an investigation are entitled to be paid an allowance and expenses, if any, to compensate them for the time and expense incurred in carrying out their role. Allowances and expenses are as prescribed by the regulations. *[Subsections 60-105(2) and (3)]*

5.103 The entity that is liable to pay the allowance and expenses (if any) in various circumstances is set out in Table 5.1.

Table 5.1

<i>If the person appears before the Board because of a nomination by...</i>	<i>Then the allowance and expenses must be paid by...</i>
an entity that has applied for registration	that entity
any other entity	the Commonwealth

[Subsections 60-105(2) and (3)]

5.104 A witness who has been sworn, or who has made an affirmation, may be allowed to give evidence by tendering a written statement rather than appearing in person before the Board. In this case, the statement must be verified by oath or affirmation. An oath or affirmation in the form of an affidavit would satisfy the requirements of this provision of the Bill. *[Subsection 60-110(3)]*

5.105 The Board may take possession of documents and things provided to it during the course of an investigation. It may make copies of such documents or things and take extracts from such documents as it considers appropriate or necessary. It may retain such documents and things for as long as is necessary for the purpose of the investigation. *[Subsection 60-120(1)]*

5.106 While the Board has possession of the document or thing, the Board must allow reasonable access to it by a person who would otherwise be entitled to possess the document or thing, including a person authorised by that person. Reasonable access to a document must be provided for the purpose of inspecting it, making copies of it and taking extracts from it. *[Subsection 60-120(2)]*

Self-incrimination

5.107 A person required to provide information or evidence or produce a document or thing to the Board for the purpose of an investigation must

do so even if doing so might incriminate the person or otherwise expose them to a penalty. This requirement prevents self-incrimination privileges from being used to obstruct the Board from obtaining information for the proper conduct of its investigations. It therefore protects the integrity of investigations conducted by the Board and enables the Board to enforce the efficient and timely collection of accurate information to conduct its investigations. [Subsection 60-115(1)]

5.108 While persons required to provide information or evidence or produce a document or thing must do so even if doing so may incriminate them, in the case of an individual, there are limits on the subsequent evidentiary use of:

- the information, evidence, document or thing given or produced, as the case may be, during the course of an investigation;
- the giving or producing of the information, evidence, document or thing; and
- any information, document or thing obtained as a direct or indirect consequence of giving or producing the information, evidence, document or thing.

[Subsection 60-115(2)]

5.109 The information acquired by the Board by abrogating the self-incrimination privilege can only be admissible evidence in specified proceedings that relate only to the provision of information and the quality (or accuracy) of the information provided during investigations by the Board. These specified proceedings are:

- proceedings for an offence against section 8C or 8D of the TAA 1953 that relate to the Bill. These sections refer to failure to comply with requirements under a taxation law and failure to answer questions when attending before the Commissioner or another person pursuant to a taxation law (eg, the Board), respectively;
- proceedings for an offence against section 137.1 or 137.2 of the Schedule to the *Criminal Code Act 1995* that relate to the Bill. These sections deal with false or misleading information and false or misleading documents, respectively; and/or

- proceedings for an offence against section 149.1 of the Schedule to the *Criminal Code Act 1995* that relate to the Bill. This section deals with obstruction of Commonwealth public officials.

[Subsection 60-115(2)]

Legal professional privilege

5.110 The investigation powers established by Part 6 do not override the principle of confidentiality of communications between legal practitioners and their clients. The Bill does not affect the law relating to legal professional privilege. *[Section 70-50]*

Outcome of investigation

Decision

5.111 The Board must make a decision following an investigation.

5.112 If the investigation relates to an application for registration under section 20-20 of the Bill, the Board must make a decision in accordance with section 20-25. That is, the Board must grant registration if the applicant is eligible for registration of the type applied for, or decline to register the applicant (details are provided in Chapter 2 of this explanatory memorandum). *[Subsection 60-125(1)]*

5.113 If the investigation relates to conduct that may breach the Bill and the Board finds that the conduct breaches the Bill, the Board must either:

- make a decision that no further action will be taken in relation to the investigation *[paragraph 60-125(2)(a)]*; or
- do one or more of the following:
 - impose one or more sanctions under Subdivision 30-B (administrative sanctions are discussed in Chapter 3 of this explanatory memorandum) *[subparagraph 60-125(2)(b)(i)]*;
 - terminate an entity’s registration under Subdivision 40-A (discussed in Chapter 2 of this explanatory memorandum) *[subparagraph 60-125(2)(b)(ii)]*;
 - apply to the Federal Court for an order requiring payment of a pecuniary penalty under Subdivision 50-C (discussed

in Chapter 4 of this explanatory memorandum)
[subparagraph 60-125(2)(b)(iii)]; or

- apply to the Federal Court for an injunction under section 70-5 *[subparagraph 60-125(2)(b)(iv)]*.

Timeframe for the making of a decision

5.114 The Board must generally make its decision within six months after the date of the Board's written notice of its decision to investigate. This limitation on the time for investigations minimises uncertainty for the applicant, unregistered entity or registered entity who is the subject of the investigation. *[Subsection 60-125(3)]*

5.115 In some cases, six months will be insufficient time to finalise an investigation. Where a delay in the conduct of an investigation is caused by reasons beyond the control of the Board, the Board has the discretion to determine a longer period within which to make its decision. This discretion must be exercised at least two weeks before the expiry of the initial six-month period, and may only be exercised once. If a longer period is determined, the Board must make its decision within that longer period. *[Subsections 60-125(3) to (5)]*

Example 5.4

The Board receives a complaint about Pru, a registered tax agent. After conducting preliminary inquiries, the Board decides to investigate the matter. The Board refers the complaint to an investigating committee and issues a notice to Pru within two weeks after its decision to investigate.

During the investigation, Pru notifies the Board that her home and office have been severely damaged in a tropical cyclone and that, as a result, she will have trouble producing the documentation by the deadline that the investigating committee originally set. Given this delay, the Board decides to extend the investigation period by six months. The Board then notifies Pru of its decision.

5.116 'Reasons beyond the control of the Board' may include, but are not limited to, the following:

- delay caused by the subject of the investigation;
- delay caused by a person giving evidence; and

- where the complexity of the investigation is such that it is not feasible to complete the investigation thoroughly and with due regard to the requirements of legislation in the allocated timeframe.

[Subsection 60-125(6)]

5.117 The Board's decision to extend the period of time within which an investigation is to be completed is reviewable by the AAT. The right to review allows those persons whose interests have been affected by the decision (depending on the circumstances and the reviewable decision itself, this may include the registered entity, a complainant, or the ATO) to question the Board's exercise of its power — refer to paragraph 2.67 in Chapter 2 of this explanatory memorandum for further explanation of the AAT review of Board decisions. *[Paragraph 70-10(i)]*

Example 5.5

The Board gathers preliminary information in relation to a complaint that it received about Daniel, a registered BAS agent, and notifies Daniel on 13 March that it has commenced an investigation into the matter. The Board appoints a committee to investigate, and the committee proceeds to gather evidence and interviews relevant persons.

Five months after commencing the investigation into Daniel's conduct, the investigating committee informs the Board that it will not be able to make a recommendation on the case within the six-month timeframe. The reasons for the delay are that the committee has had trouble contacting a key witness, Daniel has not been cooperative and the issues under consideration are of a very complex nature. The committee recommends that the investigation period be extended by three months.

Because of the time limit on investigations and the availability of the discretion to extend the time limit, on 28 August the Board accepts the committee's recommendation and decides to extend the deadline for a further three months, to 13 December. On 24 September (within 30 days of the decision) it notifies Daniel in writing of its decision and reasons and advises him that this decision is reviewable by the AAT. Daniel disagrees with the Board's reasons and seeks a review by the AAT.

5.118 If the Board does not make a decision within the six-month period or within the longer timeframe determined by the Board, then its decision is taken to be that no further action is warranted in relation to the matter that was the subject of investigation. *[Subsection 60-125(7)]*

Notification of decisions

5.119 The Board must notify certain parties if the Board investigates conduct that may breach the Bill and either finds that the conduct breaches the Bill or finds that the conduct does not breach the Bill. Notice must be given in writing within 30 days of the Board's decision or finding. *[Subsection 60-125(8)]*

5.120 The Board must notify the affected entity of its decision or finding following an investigation and provide written reasons for the decision. If the decision or finding is relevant to the administration of the taxation laws (other than the Bill), notice of the decision or finding and the reasons must be provided to the Commissioner. The complainant, if any, is also entitled to receive notice of the decision or finding following an investigation. *[Subsection 60-125(8)]*

5.121 When the Board determines a longer period for making a decision as described in paragraph 5.115, it must notify the entity affected by that determination of the determination in writing. Such notification must be provided within 30 days of the determination and must provide reasons why the longer period is required. *[Subsection 60-125(9)]*

5.122 Board decisions following an investigation are reviewable by the AAT, except for decisions to take no further action, to issue a caution and decisions to apply to the Federal Court for an order that the tax agent or BAS agent pay the Commonwealth a pecuniary penalty or for an injunction. *[Section 70-10]*

Reporting and disclosure obligations of the Tax Practitioners Board

Annual report

5.123 The Chair of the Board is responsible for ensuring that an annual report on the operation of the Board is prepared and given to the Minister for presentation to the Parliament. The report must be prepared and provided to the Minister as soon as practicable after the end of each financial year. Note that the Board's periodic reporting requirements to Parliament are governed by section 34C of the *Acts Interpretation Act 1901*. *[Subsection 60-130(1)]*

5.124 To fulfil the Board's reporting obligation, the annual report must include certain information relating to the Board's disclosure of information to law enforcement agencies — refer to paragraph 5.145. *[Subsection 60-130(2)]*

5.125 The Minister must table a copy of the report provided by the Chair of the Board in each House of the Parliament within 15 sitting days of each House following receipt of the report.

Publication of information

On the Internet

5.126 The Board must establish and maintain a register on the Internet of:

- every entity that is registered under the Bill; and
- entities that have had their registration terminated, except where the termination occurred due to:
 - the entity surrendering its registration; or
 - a reason prescribed in the regulations.

[Subsections 60-135(1) and (4)]

5.127 For each tax agent and BAS agent, and each entity listed on the Internet whose registration has been terminated, the register must include the details that are prescribed in the regulations. ***[Subsection 60-135(2)]***

5.128 In the case of those entities listed on the Internet whose registration has been terminated, the entry is only required to be maintained on the register for 12 months starting on the day on which the entity's registration was terminated, that is, the day on which the termination takes effect. ***[Subsection 60-135(3)]***

5.129 A 12-month period will assist agents to comply with the civil penalty for employing or using the services of a deregistered entity within one year of termination of its registration. It also balances the protection of taxpayers (by providing transparency) with the need to not inhibit an individual's future employment or other provision of services in the industry.

5.130 A register of tax agents and BAS agents is a valuable resource for taxpayers who wish to locate and engage a tax agent or BAS agent to obtain tax agent services.

Example 5.6

Olga, an individual registered as a tax agent, is an employee of B-Best Taxation & Accounting Services, a registered tax agent. Following preliminary inquiries, the Board appoints a committee to investigate its

concerns about various aspects of Olga's conduct over the past few months. The Board's decision following investigation results in Olga's registration being suspended for six months. Details of Olga's suspension are listed on the Board's website.

Olga is an associate member of a recognised professional association. Because the information has been made available publicly on the Board's website, the public, including Olga's recognised professional association, will be alerted to Olga's suspension. This enables the association to take appropriate disciplinary action if it chooses to do so.

In the Commonwealth of Australia Gazette

5.131 The Board must cause a notice of certain decisions to be published in the *Commonwealth of Australia Gazette*. The decisions that must be published are decisions under Subdivision 30-B or Subdivision 40-A to terminate the registration of a tax agent or BAS agent and decisions under section 30-25 to suspend the registration of a tax agent or BAS agent. [Section 60-140]

5.132 The requirement to cause a notice of such suspension and termination decisions to be published in the *Gazette* allows the application of section 153 of the *Evidence Act 1995*, which provides that notices in the *Gazette* are *prima facie* evidence of the notification.

5.133 Note that where the Board has terminated the registration of an entity under Subdivisions 30-B and 40-A for a reason related to their character, the deregistered tax agent or BAS agent cannot apply for registration for a period of up to five years, as determined by the Board. [Section 40-25]

Protection of information obtained under the Bill

5.134 In order to maintain the privacy and confidence of entities interacting with the tax system, the secrecy provisions in the taxation laws impose strict obligations on those who receive information under a taxation law. Consistent with this, and given that the Bill will be a taxation law — refer to paragraph 1.32 in Chapter 1 of this explanatory memorandum — information obtained under the Bill will be subject to a high level of protection.

5.135 Information that relates to and can identify a person will be protected. There are no limitations on the use of information that is purely of an administrative or procedural nature that does not contain any personal information (and, consequently, in relation to which there are no privacy concerns). To be protected, the information must have been obtained by a person in the course of his or her duties under or in relation

to the Bill or the regulations. It therefore does not include information obtained in a private context. *[Paragraph 70-35(1)(b)]*

5.136 A limitation on the use of protected information is imposed on a range of persons who perform duties under or in relation to the Bill or regulations. While this clearly includes past or current Board members, committee members and ATO officers providing administrative support to the Board, it also applies to any person who is or was employed by, or is or was engaged to provide services for, the Commonwealth.
[Paragraph 70-35(1)(a)]

Example 5.7

Michael, an IT professional, is contracted to develop and maintain for the Board a database that will store information relating to applications for registration. In the course of his duties, Michael has access to a considerable amount of information relating to individual applicants. Notwithstanding that Michael is not a Board member, a member of a committee or otherwise an Australian Public Service employee appointed to assist the Board, Michael's use of the information is restricted by the provisions of the Bill.

5.137 ATO officers who provide services to the Board and perform duties under the Bill are subject to the secrecy provisions in the Bill. Therefore, an ATO officer cannot disclose or record information he or she acquired in performing functions for the Board, even if another provision of a taxation law ostensibly authorises such a disclosure or record unless permitted to do so by the provisions in this Bill.

5.138 If a person discloses or makes a record of information other than in accordance with the Bill they commit an offence that is punishable by two years imprisonment. *[Subsection 70-35(1)]*

5.139 This prohibition applies to disclosures of information to another person, and 'another person' includes a Minister, court or tribunal.
[Subparagraph 70-35(1)(c)(i)]

5.140 However, no offence is committed if a person discloses or makes a record of the information under or for the purposes of the Bill or regulations or in the course of their duties under or in relation to the Bill or regulations. This extends to disclosures that are required to give effect to a specific provision of the Bill. *[Subsection 70-35(2)]*

Example 5.8

Simon, a Board member, notifies the Commissioner of the Board's decision to terminate the registration of a particular tax agent. This notification is made in accordance with paragraph 60-125(8)(c) of the Bill. It is not an offence for Simon to disclose this information to the Commissioner because Simon is merely ensuring that an obligation of the Board under the Bill is fulfilled and is therefore disclosing the information for the purposes of the Bill and in the performance of his duties under the Bill.

5.141 For a disclosure or record to be authorised it need not be referable to a specific provision of the Bill. The breadth of the phrase 'performance of duties' has been considered by the courts on a number of occasions including by the High Court (see *Canadian Pacific Tobacco Co. Ltd. v Stapleton* (1952) 86 CLR 1). A person's duties under or in relation to the Bill may include a range of functions that a person performs and that are not explicitly provided for in the Bill, for example, it may include an obligation that arises under another Act of the Commonwealth.

Example 5.9

The Commissioner issues an information-gathering notice to the Board under section 264 of the *Income Tax Assessment Act 1936*, requiring it to provide information held by the Board about a particular tax agent. It is not an offence for Marie, a Board member, to disclose this information to the Commissioner on behalf of the Board as she does so in the performance of her duties in relation to the Bill.

5.142 In recognition of the confidential nature of information obtained under a taxation law, such information cannot be compelled to be provided to a court or tribunal unless it is necessary for the purpose of carrying into effect the provisions of a taxation law. This reflects the significant loss of privacy that would result from the disclosure of this information in a public forum. Consistent with this, persons who are subject to the secrecy provisions of the Bill (as outlined in paragraph 5.136) cannot be compelled to provide information to a court or tribunal except where such a disclosure is required to give effect to the provisions of the Bill or regulations. [Subsection 70-35(3)]

5.143 In addition to being able to disclose information for the purposes of the Bill or regulations or in the performance of its duties under the Bill or regulations, the Board can disclose information that is relevant for law enforcement purposes. The Board's disclosures are linked to existing provisions in the TAA 1953 permitting the Commissioner to disclose information collected under a taxation law to certain agencies. Similar to the rationale for such disclosures by the Commissioner, this recognises

that the public interest in the Board disclosing information to such agencies overrides the resulting erosion of a person's privacy. Specifically the Board will be able to disclose information to:

- the Chief Executive Officer of the Australian Crime Commission for the purposes of a tax related investigation (section 3D of the TAA 1953); and
- a law enforcement agency or a Royal Commission for the purpose of establishing whether a serious offence has been or is being committed or for the making or possible making of a proceeds of crime order (section 3E of the TAA 1953).

[Section 70-45]

5.144 A 'serious offence' is defined by section 3E to be an indictable offence. A 'law enforcement agency', defined in section 2 of the TAA 1953, includes state and territory police departments, the Australian Federal Police and other agencies such as the Australian Securities and Investments Commission that have law enforcement powers.

5.145 The on-disclosure of this information received by such entities is governed by the provisions of section 3D and 3E of the TAA 1953. In addition, given the significant consequences which may arise for an individual as a result of such disclosures, any disclosures that the Board makes to a law enforcement agency or to a Royal Commission must be reported by the Chair in the annual report on the operations of the Board — refer to paragraphs 5.123 to 5.125. Specifically, things mentioned in paragraphs 3B(1AA)(b) and (c) of the TAA 1953 must be set out in the annual report, to the extent that the Board discloses information under section 3E of the TAA 1953 during the year. (This is consistent with similar reporting requirements for the Commissioner.)

[Subsection 60-130(2)]

5.146 In recognition of the law enforcement role that the Commissioner plays in relation to the taxation laws, the Board is also permitted to disclose information to the Commissioner for the purposes of establishing whether a taxation offence has been or is being committed or for the making or possible making of a proceeds of crime order in relation to a taxation law. The relevant definition of 'taxation offence' is that used in section 8A of the TAA 1953. *[Subsections 70-40(1) and 90-1(1)]*

5.147 A proceeds of crime order is an order that relates to a person's commission of a taxation offence that is made under the *Proceeds of Crime Act 2002* (in particular, Chapter 2 or Division 1 of Part 3-1), the *Proceeds of Crime Act 1987* (in particular, Part II or III), a law of a state or territory that corresponds to those Parts or Chapters of either of those

Acts, or the *Customs Act 1901* (in particular, Division 3 of Part XIII).
[Subsection 90-1(1)]

5.148 The possible making of a proceeds of crime order in respect of a person includes making an order that is only a possibility at the time in question because the person has not been convicted (within the meaning of section 331 of the *Proceeds of Crime Act 2002*) of an offence to which the order relates. [Subsection 70-40(2)]

5.149 While no specific on-disclosure restrictions are placed on the Commissioner when he receives information from the Board, the Commissioner's use of the information is governed by existing taxation secrecy and disclosure provisions.

5.150 The fact that the ability to disclose information for law enforcement purposes is specifically entrusted to the Board (as outlined in paragraphs 5.143 and 5.148), as opposed to other persons, recognises the sensitivity associated with disclosing information for law enforcement purposes and the significant consequences that could result for an individual.

5.151 Although these law enforcement provisions permit the Board to make certain disclosures, the secrecy provisions prohibit a person from disclosing or recording information except in certain circumstances. However, as the Board may delegate its functions or powers, it may delegate its power to decide to disclose information and/or to make the disclosure of information to an individual (such as a specific Board member). Where an individual discloses protected information in accordance with such a delegation, they do not commit an offence as they are deemed to have disclosed information as the Board (see section 34AB of the *Acts Interpretation Act 1901*).

Example 5.10

The Board becomes aware that information that it possesses may be relevant to an Australian Federal Police investigation into allegations that Alex, a registered tax agent, obtained property by deception. Obtaining property by deception is punishable by imprisonment of up to 10 years, and is therefore an indictable offence. The Board decides to disclose this information to the Australian Federal Police. Natalie, a member of the Board, has been delegated the Board's power to disclose information in such circumstances and discloses information in accordance with this delegation. Therefore, Natalie is considered to have exercised this power as the Board and therefore will be protected by the operation of section 3E of the TAA 1953.

Chapter 6

Regulation impact statement

Background

6.1 Tax agents are currently regulated under Part VIIA of the *Income Tax Assessment Act 1936* and Part 9 of the *Income Tax Regulations 1936*. Part VIIA, which imposes a mandatory registration system for entities providing tax agent services for a fee, was inserted in 1943 and remains largely unchanged. It replaced various items of state legislation as the passage of the uniform income tax legislation necessitated uniform treatment of tax agents.

6.2 When Part VIIA was introduced, regulation of tax agents was considered necessary for reasons of both consumer protection and administrative control. Registration of tax agents was considered to be in the best interests of both the taxpayer (who would benefit with an assurance that their agent is reputable and competent) and the taxation department (which would be able to deal effectively with unscrupulous persons who may exploit taxpayers and expose them to penalties).²

6.3 Since Part VIIA was introduced, the movement to a self assessment system in 1986-87 shifted the balance of risk and uncertainty towards taxpayers. Self assessment effectively moved the responsibility of interpreting and applying the law to particular circumstances from the Australian Taxation Office (ATO) to individual taxpayers.

6.4 In addition, Australia's tax environment has changed significantly in a number of other ways:

- The expansion of the tax base to include capital gains tax (CGT), fringe benefits tax (FBT), expanded superannuation regimes, and the goods and services tax (GST).
- Several waves of tax reform during the 1980s and 1990s, which resulted in the addition of new regimes

² Second Reading Speech of the then Treasurer, Ben Chifley, with reference to the findings and recommendations of the Royal Commission on Taxation 1932-1934 (the Ferguson Commission).

(eg, consolidation), special treatment for market segments (such as special concessions for small business) and the rewriting of significant parts of the law (eg, through the Tax Law Improvement Project).

- The expansion of taxation expenditures to include numerous family assistance and industry policy measures.
- Responses to the threats of several concerted periods of tax avoidance activity.

6.5 Taken together, these developments have markedly increased the volume and complexity of the taxation laws (at least in terms of the number of interactions), leading to significant challenges for those seeking to interpret and apply them.

6.6 These changes, together with lifestyle decisions, have led to significant growth in the use of tax agents over the last 20 years. Engaging an agent relieves taxpayers of some of the anxiety and uncertainty faced under self assessment and assists them to deal with the complexity in the taxation laws. Whereas, in 1980, approximately 20 per cent of individual taxpayers sought professional assistance from tax agents to lodge their tax returns, by 1992 this figure had grown to 72 per cent.³ At present there are approximately 26,000 tax agents who prepare and lodge around 74 per cent of individual tax returns and over 95 per cent of tax returns for business.⁴

6.7 Although the rationale for the introduction of Part VIIA in 1943 remains relevant and valid today, the changes in the regulatory environment and the growth of the taxation laws have prompted consideration of whether the existing registration system remains appropriate and adequate for the contemporary setting.

6.8 This potential need for realignment of the legislation with its setting was contemplated when, during the early 1990s, the regulatory arrangements and professional standards for tax agents were reviewed. The review was performed by a working party of accountants, legal practitioners, tax agent representatives and the ATO, and its report, *Tax Services for the Public*, was issued in November 1994. The report examined the need for regulation and concluded that continued

³ National Review of Standards for the Tax Profession 1994, *Tax Services for the Public: Report of the National Review of Standards for the Tax Profession*, page 5, Australian Government Publishing Service, Canberra.

⁴ Australian Taxation Office, *Compliance Program 2006-07*, Commonwealth of Australia (available at www.ato.gov.au).

government intervention is necessary and that the existing legislation should be updated and strengthened to redress the deficiencies that had become apparent over time.

6.9 Although in April 1998 the introduction of a new legislative framework for tax agent services was announced, its implementation was postponed at the behest of the tax profession to allow it to adjust to other changes to the tax environment occurring at that time.

6.10 Work on the new regulatory framework recommenced in 2002, using the findings outlined in *Tax Services for the Public*, and the existing legislation, as a base.

Problem specification

6.11 The need for reform is justified by deficiencies with the existing regulatory framework. These deficiencies can be classified into three broad categories.

Inconsistency in the regulation of agents

6.12 The existing framework is narrowly centred around a registration system for tax agents with a focus on services related to income tax only. Although this approach was appropriate at the time of its inception, the tax base has expanded significantly over recent decades, with an associated increase in the volume and the complexity of the taxation laws. Indeed, the introduction and pervasiveness of new taxes such as the GST, FBT and CGT, without corresponding adjustments to the scope of the regulatory framework, has resulted in the regulation no longer reflecting the reality of the commercial environment. There is now a strong argument for broad, transparent and systemic regulation of the provision of tax agent services, which would reflect the broader scope of services being provided given the expansion of the tax base.

6.13 This narrow focus of the existing regulatory framework prevents certain competent providers of Business Activity Statement (BAS) services and specialised tax agent services from providing tax agent services, creating inconsistencies in the framework's coverage:

- Currently, only a small set of entities is permitted to provide BAS services for a fee, limited to registered tax agents (who are qualified to prepare income tax returns and transact business on behalf of taxpayers in income tax matters), and individuals such as those who are members of a recognised professional association (which are largely the accounting professional associations) or who work under the direction of

a registered tax agent (a requirement which is rarely enforced due to uncertainty as to the meaning of the phrase ‘under the direction’). This limitation does not necessarily reflect the qualification/skills required to provide BAS services competently.

- In addition, entities which specialise in services related to a particular area of the taxation laws (other than income tax) or a particular type of service such as advice rather than return preparation are unable to register without demonstrating a range of experience that extends beyond their specialisation to cover a variety of services across the income tax laws. This impacts on both the specialist agent, who encounters high barriers to entry and who cannot truly specialise, and also consumers, by, in turn, restricting competition.

6.14 Even within the existing regulatory framework there are inconsistencies. Registration and regulation, although under Commonwealth legislation, are administered on a state basis by the six Tax Agents’ Boards (state Boards), which has led to inefficiencies with duplication of services and administrative functions. It has also allowed inconsistencies in interpretation and application of the law to develop, which in turn has consequences for the consistent regulation of tax agents across the states and results in discrepant standards of services provided to taxpayers.

6.15 Although many tax agents are currently subject to codes of ethical and professional conduct by virtue of their memberships of professional associations, such market initiative does not apply consistently across all of the industry, as not all agents are members of such organisations.

Inadequacy of consumer protection

6.16 For consumers, the narrow focus of the existing regulatory framework has two consequences:

- The first relates to quality of service provision. The different degrees of regulation under the current law for the provision of different types of tax agent services results in services of varying standards. For example, throughout consultation on these reform proposals, participants have communicated that the limited regulation of the provision of BAS services under the current law has allowed for a low standard of service provision, with tax agents frequently being required to re-perform work completed by bookkeepers to ensure its accuracy. The need for re-performance could cause inflation

of costs to consumers and a decline in confidence in the industry.

- The second consequence relates to market competition which is affected by the presence of the inappropriate barriers to entry described above. The entry barrier for providers of BAS services, for example, is not aligned with the skills and knowledge required to provide BAS services. This misalignment allows certain unqualified people to provide BAS services while preventing other qualified people from providing BAS services. This disrupts the efficient operation of a competitive market which benefits consumers. Further, the fact that the requirement that an individual be working under the direction of a registered tax agent is rarely enforced (due to uncertainty as to its meaning) also creates incentive and opportunity for illegal operators in the market and exposes clients to risk.

6.17 The consumer protection deficiencies of the existing legislation are also evident in the lack of clarity for agents in terms of what is required and the lack of flexibility for the state Boards in terms of the imposition of sanctions, as outlined below.

6.18 The current law does not contain clear and uniform standards required of agents providing tax agent services. Instead, it only lists certain serious misdemeanours which may or will result in the termination or suspension of registration. This has the following consequences for consumers:

- the quality of tax agent service provision can vary significantly and largely depends on an individual's own professional ethics (or membership of a professional association which imposes certain standards on its members); and
- there is not a standard against which consumers can evaluate the competence and ethical standards of tax agents and there is no requirement for public dissemination of information about tax agents. As such, there are information asymmetries between tax agents and their clients which expose consumers to a risk of adverse selection.

6.19 The administrative sanctions available to the state Boards to discipline tax agents are inflexible and too limited, leading, at times, to counterproductive outcomes: the state Boards can only take an 'all or nothing' approach to regulation for misconduct. Because the sanctions available to the state Boards are limited to suspension or termination of

registration, unless the misconduct is sufficiently serious to warrant the taking away of a person's livelihood, the state Boards are reluctant to impose a sanction. The ATO has advised that, in 2007-08, of 660 complaints that have been finalised, only 25 resulted in the imposition of a sanction.

Threat to the integrity of the tax system

6.20 Increasing complexity in the taxation laws has corresponded with an increasing proportion of the taxpaying public engaging the services of tax specialists to assist them to comply. With a regulatory framework that is inflexible and too narrow, the risk of incompetent work being performed is high. This could lead to a lower level of compliance, thereby subjecting taxpayers to additional risk and impacting on revenue collection.

6.21 In addition, uncertainty in the current law, inflexibility in its administration and excess demand created by inappropriate entry barriers have allowed illegal operators in the market which undermines the integrity of the tax system. For example, anecdotally, some BAS services are currently being provided unlawfully by unregulated entities.

Summary of distribution of benefits and costs under the current framework

6.22 These examples demonstrate that the deficiencies in the current regulatory framework impact negatively on taxpayers, agents and the tax system as a whole. In particular:

- in terms of the industry, tax professionals specialising in aspects of the taxation laws other than income tax are affected most acutely, as they are unable to register without demonstrating a range of experience beyond their specialisation, and therefore are not accommodated as specialist agents in their own right; and
- in terms of consumers, key costs are the uncertainty faced around the quality of services received and concern about exposure to risk.

6.23 Accepting that the current framework is outdated, generally positive feedback throughout extensive consultation over many years on the reform proposals suggests that the benefits to any party of the existing situation, in the contemporary environment, are few. Indeed the only party which may benefit from the existing situation is those misbehaving tax agents or unregistered service providers who are currently operating

within the industry without being subject to sanction or clear, unambiguous regulation.

Objectives of government action

6.24 Broadly, the objective of government action is to redress the deficiencies identified above.

6.25 Specifically, the policy objectives of the new legislative framework for tax agents and BAS agents are:

- for tax agents and BAS agents — to improve consistency in registration and to regulate the provision of tax agent services in an appropriate, but flexible, way;
- for taxpayers — to enhance the protection of consumers of tax agent services, thereby reducing the level of uncertainty for taxpayers and the risks associated with the self assessment system; and
- for the system — to strengthen the integrity of the tax system and the tax industry.

6.26 The objectives outlined above are broadly stated in the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs Media Release No. 039 of 29 May 2008.

Options that may achieve objectives

6.27 To address the deficiencies and achieve the objectives, the only viable option is continued explicit government intervention with a focus on a more robust regulatory framework. This is consistent with the recommendation in *Tax Services for the Public*, which concluded that the public interest is best served by a mandatory registration system for all those in the business of providing tax agent services, supplemented with appropriately enforceable standards of conduct.

6.28 The key elements of such an option would be:

- a national Tax Practitioners Board (Board) to replace the existing state-based Boards to, among other things, make consistent the registration process and standardise the way in which tax agents are regulated across the country;

- registration and regulation of both entities providing tax agent services (as tax agents) and entities providing BAS services (as BAS agents);
- a legislated and enforceable Code of Professional Conduct (Code), based largely on the codes of the professional associations, to make explicit the standards expected of tax agents and BAS agents and to clearly define their roles and responsibilities;
- a wider and more flexible range of administrative sanctions which may be imposed by the Board;
- civil penalties and injunctions to replace criminal penalties for certain misconduct by agents and unregistered entities; and
- ‘safe harbours’ which provide that, in certain circumstances, taxpayers who engage a tax agent or a BAS agent are not liable to administrative penalties that would otherwise ordinarily apply for making a false or misleading statement resulting in a tax shortfall amount, or for lodging a document late.

6.29 Building on and strengthening the existing law will create fewer additional compliance and administrative costs than instituting an entirely new regulatory framework.

6.30 Other options were explored in *Tax Services for the Public* and during the development of the proposals:

- To deregulate the industry and rely on self-regulation or quasi-regulation would be ineffective at achieving the policy objectives. This approach would arguably decrease standards and quality of service in a complex area of the law, reducing the accuracy of taxpayers’ tax returns, creating uncertainty for consumers, and exposing them to risks of penalties. As such taxpayers may obtain no benefit from engaging a ‘professional’.
- The option of strengthened co-regulation was canvassed early in the legislative design phase. Two elements of this option were considered:
 - allowing the professional associations to certify the academic qualifications and relevant work experience

requirements for registration, as well as possibly the determination of agents' fitness and propriety; and

- sharing information about agents' conduct with the professional associations, thereby allowing the professional associations to sanction their members in accordance with their own rules.

This option was later abandoned at the recommendation of the professional associations, which expressed concern about both elements. Their concern with the former related to their inability to gather the necessary information and to recover the resources expended. Their concern with the latter was the potential exposure to civil liability for imposing sanctions either prior to the Board's decision or that differ from the Board's conclusion.

6.31 These options are not considered further in this regulation impact statement.

6.32 The option of strengthened explicit government regulation is considered against the backdrop of retaining the current system of tax agent registration (ie, maintaining the status quo). Retaining the existing regulatory framework would clearly not achieve the objectives identified above. It would commit agents and the state Boards into the current regime without flexibility to deal with the contemporary environment and issues. Additionally it would be inconsistent with the expectations of the profession, which has invested significant resources in the development of the measure.

Impact analysis

Impact group identification

6.33 The measure will impact on all taxpayer groups (including individuals and businesses which do or do not use the services of tax agents), tax agents, bookkeepers and other intermediaries, professional and para-professional associations, the state Boards, and the ATO. Many tax agents and bookkeepers operate as small businesses.

6.34 There are currently approximately 26,000 registered tax agents who will be directly impacted by these proposals⁵. In addition, the ATO

⁵ Australian Taxation Office, *Compliance Program 2006-07*, Commonwealth of Australia (available at www.ato.gov.au).

has advised that there are a further 11,000 nominees (of partnership and company registered tax agents) who will be affected. In terms of other intermediaries, there are over 120,000 people working in the bookkeeping industry, 10 to 15 per cent (12,000 to 18,000) of whom are in business lodging BASs for clients for a fee⁶.

Impact of reforms

Analysis of benefits

Taxpayers / consumers

6.35 The key benefits to consumers, including small business consumers, are likely to be:

- greater protection and certainty that a tax agent or BAS agent has demonstrated and maintains a certain degree of competence (in terms of qualifications and experience and continuing professional education) and is bound to act in accordance with the statutory Code;
- increased competition with respect to the tax agent services industry as a whole, as there will be a significant increase in the number of registered entities which can provide different types of tax agent services:
 - in terms of BAS agents, although imposing barriers to entry could decrease competition, the proposed very low level of entry requirement and long transitional period are expected to allow a majority (if not all) of the individuals currently providing BAS services to be registered and will therefore not inhibit the promotion of competition within this segment of the industry; and
- a ‘safe harbour’ (or exemption) from certain administrative penalties in certain circumstances where they engage an agent — refer to paragraphs 6.52 and 6.53.

⁶ Australian Taxation Office, *Compliance Program 2006-07*, Commonwealth of Australia (available at www.ato.gov.au).

Tax agents, BAS agents and other intermediaries

6.36 Agents, including small business agents, will benefit from the new framework in the following ways:

- improvement to the clarity of regulation and requirements, through well balanced law, coupled with flexibility for the Board which will be supplemented by detailed explanatory material and guidelines to be issued as legislative instruments by the Board;
- recognition of the important role that providers of BAS services play in the tax system;
- improvement to the reputation of the profession, which could enable agents to attract more business;
 - The measure will ‘raise the bar’ for tax agents, and intends to raise the bar for BAS agents gradually through the proposed transitional period which will allow them time to obtain the necessary training.
- removal of inefficient barriers to entry with regard to the relevant employment requirement in the existing law, which currently precludes specialists from registering as tax agents. Registration of specialists could expand the tax agent industry to meet the existing excess demand for tax agent services; and
- a broader range of more constructive and educative administrative sanctions which may be applied in cases of breach, rather than only the final sanctions of suspension and cancellation of registration.

Professional associations

6.37 The measure proposes to allow the Board to recognise associations which meet certain prescribed criteria (relating to membership numbers, professional, ethical and educational standards and governance and management procedures) as recognised BAS agent associations. This provides such associations with the opportunity to market themselves with a view to increasing their membership numbers. Importantly, it also provides an incentive to offer a variety of services to members that may benefit BAS agent members.

6.38 There is expected to be little impact on recognised professional associations (tax and accounting professional associations), which will continue to be able to be recognised under the new regulatory framework.

State Tax Agents' Boards

6.39 The state-based Boards will be replaced by a national Tax Practitioners Board.

6.40 The establishment of a nationally administered framework will improve the Board's economies of scale and enhance consistency in the Board's decision making processes and outcomes. The gains in terms of efficiency and the associated administrative cost savings are expected to be significant. Currently, the six state Boards are resourced individually (but each to the same level, regardless of relative workloads) by the ATO through its annual appropriation. They have their own rules and procedures and make decisions independently of each other. The national Board will be better able to allocate its operational budget in accordance with its priorities and create a nationally consistent regulatory framework. It will have the opportunity to centralise many of its functions and to implement process and technological improvements, such as electronic record-keeping and an interface with agents, as well as an electronic case management system to manage complaints handling and the Board's proactive integrity work.

Tax system

6.41 The measure is designed to contribute to greater institutional certainty. This is expected to have a positive economic impact as administrative and transaction costs within the tax system will reduce with the anticipated reduction in inefficiencies (eg, either elevation of tax agent performance standards or underperforming agents exiting the industry).

Analysis of costs

Compliance costs

6.42 The ATO has estimated that the potential transitional compliance cost impact of the measure (with a medium level of confidence) will be:

- a small cost for tax agents and BAS agents with the appropriate qualifications:
 - The requirements for registration as a tax agent will remain largely the same as under the existing law. On transition, registration under the current law will be taken as registration under the new law.
 - Although the measure represents a strengthening of the existing framework, there are likely to be some transitional compliance costs associated with learning

about the changes. This could be partially offset by increased certainty about tax agents' rights and responsibilities.

- The ATO has advised that approximately 50 per cent of the bookkeepers who are currently in business lodging BASs for clients for a fee are expected to already hold the required Certificate IV Financial Services qualification in either bookkeeping or accounting.
- New entrants seeking registration as BAS agents will need to pay a registration application fee, proposed to be \$100 or \$50 (depending on whether or not the agent is carrying on a business), and will also need to obtain professional indemnity insurance.
- a potentially large cost for those bookkeepers who are currently in business lodging BASs for clients for a fee (and who are expected to seek registration as BAS agents) but do not currently meet the minimum standard of qualification. The cost of obtaining the necessary qualification will crystallise after two years and may be spread over as many as five years for many bookkeepers, given the proposed transitional arrangements. As many bookkeepers operate as small businesses, these costs do reflect (at least in part) a cost of the measure to small business:
 - The transitional compliance cost for bookkeepers without the necessary qualifications is estimated to be up to \$15,000 each (\$110 million for a population of approximately 7,500), however 78 per cent of this cost estimate reflects the estimated opportunity cost of gaining the required qualification.
 - Many education providers grant credit (in some cases up to 100 per cent) for relevant prior study and/or work experience. It is anticipated that a large number of bookkeepers will be eligible for such credit, and this will significantly reduce the initial compliance costs. For example, if 50 per cent of the course is granted in recognition of relevant work experience, implementation costs are expected to be \$8,700 per bookkeeper (\$65 million for a population of 7,500).

6.43 Ongoing compliance costs are estimated to be:

- nil/minimal for tax agents; and
- small, at \$1 million per annum, for BAS agents (approximately \$67 each per annum):
 - The registration application fee will be payable at most once every three years. Other expected costs are those associated with continuing education.

6.44 With regard to the introduction of a legislated Code, the impact will be minimal on many currently registered tax agents and individuals providing BAS services, who are subject to codes of conduct by virtue of their membership of professional associations. The impact will be greater on BAS agents entering the industry, who are not members of an association and have not previously been subject to a code of conduct. The proposed Code will not, however, be onerous and will reflect a minimum standard of professional and ethical behaviour of agents.

6.45 The introduction of the ‘safe harbour’ provisions may impose some costs on agents in terms of record-keeping.

Administrative costs

6.46 Additional funding for the implementation of the measure of \$57.5 million over four years was allocated and announced in the 2006-07 Budget. This includes funding to cover:

- the development of information technology systems:
 - this represents costs associated with changes to the Tax Agent Portal, the development of registration, accounting and correspondence systems and the development of a new Board website; and
- community education programs about the changes in the law and penalty provisions.

6.47 The ATO has advised that the ongoing administrative cost is estimated to be at least \$14 million per year. This represents a net change of approximately \$4 million from the 2007-08 financial year (however the administrative cost of approximately \$10 million for the 2007-08 financial year includes not only the cost of administering the current framework, but also the cost of preparing for the new framework). The current spending on the state Boards is conservative given that the ATO has been in a ‘holding pattern’ over past years in anticipation of the new framework

becoming effective (ie, the existing state Boards are not currently sufficiently resourced to perform all of their functions effectively). In addition, the proposed expanded role and functions of the proposed Board will require an increase in its budget.

6.48 Additionally, costs related to the administration of the proposed 'safe harbour' provisions are estimated at \$9.089 million over four years.

6.49 The administrative costs are associated with:

- the regulatory role of the national Board including the registration of BAS agents and activity around enforcing compliance with the Code:
 - Additional administrative resources will be made available to assist the Board. The ATO has estimated that secretariat staffing of approximately 100 to 110 full-time equivalent positions will need to be made available during the first two years, estimated to settle at approximately 90 full-time equivalent positions in future years. By contrast, currently approximately 70 full-time equivalent positions are dedicated to Board assistance.
- the administration of safe harbours for taxpayers in certain circumstances when they engage an agent:
 - This cost is associated with designing and building administrative systems and debt collection and lodgment management.
 - The timing of the application of the safe harbours (either prior to or following the imposition of a penalty) will provide flexibility to ensure that they are able to be administered in the most efficient way with minimal impact on the ATO's existing lodgment program.

Revenue costs

6.50 As the new arrangements do not introduce or remove taxes, the measure will not have a significant impact upon government revenue.

6.51 It is expected that the impact of replacing criminal penalties with civil penalties will result in a small gain to revenue. This gain is not expected to exceed \$1 million over four years.

6.52 There is expected to be a cost to revenue associated with the introduction of 'safe harbour' provisions which exempt taxpayers from administrative penalties in certain circumstances.

6.53 The safe harbour from tax shortfall penalty will apply if taxpayers demonstrate that they took reasonable care by engaging a registered agent and providing them with all necessary tax information, but the agent carelessly made a false or misleading statement that resulted in a shortfall amount. The cost of this safe harbour is unquantifiable (meaning that there will be a cost, but that it cannot be measured reliably) due to a lack of data on the percentage of penalties raised due to careless tax agent errors, where the taxpayer has provided them with the correct information.

6.54 The safe harbour from administrative penalty for failing to lodge a document on time and in the approved form is proposed to apply if taxpayers establish that they engaged a registered agent, gave their agent all relevant information to enable the lodging of a document on time in the approved form and the agent carelessly failed to do so. The cost of this safe harbour is unquantifiable due to a lack of data on the percentage of penalties raised due to tax agent carelessness, as well as the unknown impact of the exemption on the behaviour of taxpayers and their agents.

6.55 In both cases, the sensitivity analyses suggest that a small change in the assumed percentage of tax agent errors can have a large impact on the cost estimates.

Anticipated net impact

6.56 In summary, the principle costs of the measure are associated with the following elements:

- compliance costs borne by bookkeepers to obtain the educational qualifications required for registration as a BAS agent; and
- administrative costs borne by the Government to fund the national Board at a sufficient level to enable it to perform its legislated functions, including its role registering and regulating a larger number of agents.

6.57 While the benefits cannot be quantified, it is expected that the costs will be more than offset by the benefits to taxpayers, agents and the tax system as a whole outlined above, resulting in an overall net benefit of the measure. In terms of the key elements of the measure, broadly speaking:

- establishment of a national Board will benefit agents by providing nationally consistent regulation and will benefit the Board by enabling greater efficiency in the use and allocation of its resources;
- registration and regulation of tax agents and BAS agents, including the introduction of the Code, will benefit taxpayers who engage agents and the tax system as a whole by regulating the standard of services provided and improving confidence. It will also provide certainty and clarity for agents as to what is expected of them, and should therefore reduce compliance costs. BAS agents will face certain barriers to entry, but will benefit from the clarity provided by a move away from the partially regulated but unenforced arrangement in place currently;
- taxpayers will benefit from the introduction of a wider range of administrative sanctions which may be imposed by the Board through the assurance that agents will be appropriately disciplined for breaches of the Code. Agents will also benefit from the expansion of options available to the Board rather than just suspension or termination of registration. Administrative flexibility also has the benefit of allowing the Board to administer the system most efficiently;
- replacement of criminal penalties with civil penalties and injunctions will benefit agents and the integrity of the tax system, by providing appropriate disincentives to act inappropriately; and
- safe harbours from certain administrative penalties in certain circumstances where a taxpayer engages a tax agent will provide greater protection for taxpayers and will improve the integrity of the tax system by encouraging taxpayers to engage tax experts to assist them in their interactions with the tax system.

Consultation

6.58 The details of the new regulatory framework and the draft legislation have evolved through extensive consultation with tax agents and bookkeepers, tax, accounting and legal professional associations and bookkeeper associations, representatives of community organisations, government departments and agencies including the ATO, the state Boards and taxpayers.

6.59 The broad range of entities consulted and the extent of consultation has resulted in an appropriately balanced regulatory framework. Consultation has promoted stakeholder buy-in and ownership of the reforms, and has undoubtedly led to better, more robust, outcomes. Indeed, the key elements of the measure have received unanimous support.

6.60 Consultation spanned the period since the establishment of the working party in 1992 — refer to paragraph 6.8 — through to late 2008, and included:

- confidential consultation on the framework during the late 1990s;
- extensive confidential consultation with the tax profession in 2004 and 2005 on the proposed framework (including on a Treasury discussion paper) and in 2006 and 2007 on draft legislation prior to public release:
 - Throughout these consultation processes the tax profession expressed general support for the proposed reforms and indicated its endorsement of release of an exposure draft package for public consultation. Prior to the public release, several revisions and refinements were made to draft legislation as a result of concerns raised.
- release of a first exposure draft package for public consultation for 14 weeks from 9 May 2007 to 10 August 2007, followed by numerous consultation meetings with key stakeholders:
 - Treasury received 114 submissions in response to the exposure draft package, most of which expressed broad support for all of the elements of the proposed reforms. The key issues raised were a need for greater clarity in the wording of various principles of the proposed Code and a need for independence of the Board from the ATO. These concerns were raised by practitioners, the legal, tax and

accounting professional associations, the ATO and the existing state Boards. Amendments made to the materials to address concerns raised included revisions to the Code and associated explanatory materials and the transfer of the exposure draft into its own, separate Bill, of which the Board — and not the Commissioner of Taxation — has the general administration. Some relatively minor technical adjustments were also made.

- public consultation on a revised exposure draft legislative package for four weeks from 29 May 2008 to 27 June 2008:
 - Treasury received 45 submissions which expressed broad support for the revised package and acknowledgment of the issues addressed through the initial public consultation process. The key issues raised in submissions concerned aspects of the Code, largely resolved through minor amendments to wording and discussions with the accounting profession and professional associations, and the extent to which financial services licensees are permitted to provide tax agent services without registration as a tax agent, resolved through minor amendment of the proposed definition of ‘tax agent service’ to express clearly the policy intention. Some other relatively minor amendments were made to the draft legislation and explanatory materials.

6.61 Very few concerns were raised by small business throughout the consultation processes about the anticipated impacts on that segment of the community in particular. A very small number of submissions raised concern with the costs to small business BAS agents of obtaining registration. To address such concerns, a low start up requirement and long transitional period are proposed to be provided. These will enable such businesses to enter the new framework initially without being required to have the necessary educational qualifications, and to spread the associated costs of obtaining the qualifications over several years. Additionally, the registration application fee is proposed to be relatively low and a cost recovery approach has not been adopted.

Further consultation

6.62 Consultation on the complete set of transitional provisions and consequential amendments is expected to take place in late 2008 or early 2009, prior to planned introduction during the Autumn 2009 Parliamentary sitting period.

Conclusion and recommended option

6.63 The decision to strengthen the existing framework for registration of tax agents through additional explicit government regulation was made in partnership with industry and community representatives.

6.64 The details of the measure (including the introduction of the Code and the creation of a national Board) are the result of a broad consultative process undertaken over many years with the major stakeholders in the tax system. Accordingly, they represent the most efficient and transparent approach to achieve the desired policy outcomes. Further, as the proposal essentially builds on existing registration and regulatory arrangements, it will not impose a significant implementation or compliance cost on stakeholders.

6.65 This proposal is envisaged to promote greater certainty and transparency for taxpayers, clarity for agents in terms of their roles and responsibilities, and greater consistency and efficiency in the regulatory system.

Implementation and review

Implementation and enforcement

6.66 The Board will be a statutory body that falls within the Treasury portfolio. Its membership will be appointed by the relevant Treasury Portfolio Minister and will be drawn from the industry. It will operate independently, as its functions and powers will be vested in it by statute. The administrative and secretariat services will initially be provided by Australian Public Service employees (specifically, ATO officers), but this arrangement may change pending the outcome of the post-implementation review mentioned in paragraph 6.70.

6.67 Entities seeking to provide tax agent services (including BAS services) for a fee will need to apply to and register with the Board. Registration will require demonstration that they meet the prescribed qualifications and experience requirements, and the 'fit and proper person' test.

6.68 Registered agents will need to comply with the Code, which will be drafted in principles with clear guidance on what is regarded as compliant behaviour provided in the explanatory memorandum and in legislatively enforceable guidelines to be issued by the Board.

6.69 Compliance with the Code will be enforced by the Board, which will have available to it a broad range of administrative sanctions ranging from a written caution through to termination of registration. The Board will also be able to apply to the Federal Court of Australia for a civil penalty order or injunction where an agent or unregistered entity breaches a civil penalty provision.

6.70 The ATO will administer the application of the 'safe harbours' from certain administrative penalties that are available to taxpayers in certain circumstances where they have engaged a registered agent. The onus, however, will be on the taxpayer to demonstrate that the safe harbour should apply to them.

Review of regulation

6.71 The measure does not contain a statutory review requirement. However, the Government intends that the operation of the legislation will be reviewed within three years of implementation, with particular emphasis on (but not being limited to) the governance arrangements for the Board and the operation of the 'safe harbour' from penalties in certain circumstances for failing to lodge a return, notice, statement or other document in the approved form and on time.

6.72 In any case, the legislation will be reviewed under the Government's five-yearly review requirements.

