

Tax on the Couch



**Talking Points:
January/February 2010**

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Talking Points: Jan/Feb 2010

Jan/Feb 2010 Legislative Update

New Bills

Fairer Private Health Insurance Incentives (Medicare Levy Surcharge) Bill 2009 [No. 2]

Part of a package of three bills to effect three private health insurance tiers, the bill amends the *Medicare Levy Act 1986* to increase the rate of Medicare levy surcharge for certain taxpayers who do not have complying health insurance and whose income for surcharge purposes is above the relevant Medicare levy surcharge threshold.

Fairer Private Health Insurance Incentives (Medicare Levy Surcharge—Fringe Benefits) Bill 2009 [No. 2]

Part of a package of three bills to effect three private health insurance tiers, the bill amends the *A New Tax System (Medicare Levy Surcharge--Fringe Benefits) Act 1999* to increase the rate of Medicare levy surcharge for taxpayers who do not have complying health insurance and whose income (including reportable fringe benefits) for surcharge purposes is above the relevant Medicare levy surcharge threshold.

Fairer Private Health Insurance Incentives Bill 2009 [No. 2]

Part of a package of three bills to effect three private health insurance tiers, the bill amends the *Income Tax Assessment Act 1936*, *Income Tax Assessment Act 1997*, *Private Health Insurance Act 2007*, *Taxation Administration Act 1953* and *Taxation (Interest on Overpayments and Early Payments) Act 1983* to reduce the amount of private health insurance rebate eligible taxpayers with complying private health insurance are entitled to when their income for surcharge purposes is above the relevant Medicare levy surcharge threshold.

Tax Laws Amendment (2009 GST Administration Measures) Bill 2009

This Bill makes amendments in relation to:

- the requirement that input tax credits and fuel tax credits are claimed within a four year period;
- enabling residents of Australian external territories to claim refunds of good and services tax (GST) and wine equalisation tax under the tourist refund scheme;
- enabling certain intermediaries to act as a principal for GST accounting purposes;
- the calculation of the gambling operator's margin when the supplies made by the operator are GST-free;
- the treatment of supplies and acquisitions between associates without consideration; and
- the treatment of overpaid refunds.

Tax Laws Amendment (2009 Measures No. 6) Bill 2009

This Bill amends the:

- *Income Tax Assessment Act 1997* to remove the CGT trust cloning exception; provide a limited capital gains tax roll-over for the transfer of certain assets between trusts with the same beneficiaries; allow the roll-over of capital losses and transfer of revenue losses when complying superannuation funds merge; and update the list of deductible gift recipients;
- *Income Tax Assessment Act 1997*, *Tax Laws Amendment (2006 Measures No. 2) Act 2006* and *Superannuation Legislation Amendment (Simplification) Act 2007* to clarify the circumstances in

which income derived by life insurance companies in respect of immediate annuity business qualifies as non-assessable non-exempt income;

- *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to provide that the Income Recovery Subsidy for the North Western Queensland floods is not subject to income tax; and
- *Excise Act 1901* to provide that the blending of spirits constitutes excise manufacture.

Draft Bills

GST Administration - Input Tax Credit Attribution and Third Party Adjustments: Exposure Draft Legislation and Explanatory Memoranda

On 14 December 2009 further exposure draft legislation and exposure draft memoranda was released for public consultation to implement the following announced measures:

- clarifying the input tax credit attribution rules; and
- introducing GST adjustments for third party payments.

Superannuation Clearing House - Exposure Draft of Legislation and Associated Explanatory Material

In the 2008/09 Budget the Government announced the measure to provide a free superannuation clearing house service for small businesses. The measure is designed to reduce the cost to small businesses of complying with their superannuation obligations. On 6 November 2009, the Government announced that the free superannuation clearing house service for small businesses will be delivered through Medicare Australia.

The draft legislation amends the *Superannuation Guarantee (Administration) Act 1992*, the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993* to:

- allow employers to meet their obligation to make compulsory superannuation contributions for the benefit of their employees by paying to an approved clearing house;
- extend the conditions under which superannuation contributions by an employer for the benefit of an employee are made in compliance with the choice of fund requirements to cover circumstances where contributions are made through an approved clearing house; and
- allow an employer to satisfy its obligation in relation to the prompt remittance of superannuation amounts deducted from an employee's salary or wages by making payments to an approved clearing house.

Exposure Draft - Minor Amendments to Tax Laws

The exposure draft and draft explanatory memorandum relate to proposed minor amendments to the taxation laws, which seek to ensure the law operates as intended, by correcting technical or drafting defects, removing anomalies and addressing unintended outcomes. The amendments also include minor improvements to the tax laws.

Some of the amendments address issues raised through the Tax Issues Entry System (TIES). The TIES website (www.ties.gov.au), operated jointly by the Australian Taxation Office and Treasury, provides a vehicle for tax professionals and the general public to raise issues relating to the care and maintenance of the tax system.

The more significant amendments are:

- ensuring that a replacement dwelling that is eligible for the compulsory acquisition roll-over is treated as a continuation of the original dwelling for CGT main resident exemption purposes, with application to CGT events happening on or after the day this Bill receives Royal Assent;

- correcting an unintended effect on the operation of the small business CGT retirement exemption made by the *Superannuation Legislation Amendment (Simplification) Act 2007* which inadvertently made payments, or parts thereof, that a trust makes under the retirement exemption to a CGT concession stakeholder subject to CGT event E4 (contained in S.104-70 of the Income Tax Assessment Act 1997 (ITAA 1997));
- enabling the Commissioner to waive tax-related liabilities, in appropriate cases to facilitate proceedings under the *Proceeds of Crime Act 2002* (POC Act);
- extending the administrative penalty for making a false or misleading statement to cover statements that do not produce a shortfall in tax; and
- clarifying that the hypothetical dividend a capital benefit is compared to, in working out whether there is a tax benefit, is an assessable dividend.

Managed Investment Trusts: Capital Account Treatment Legislation and Explanatory Material

This exposure draft legislation proposes changes to the taxation of gains and losses on disposal of certain investments by Australian MITs, as announced in the 2009/10 Budget. The legislation provides certainty as to the taxation of disposal of shares, units and certain land investments by eligible MITs.

Broadly, the changes will allow an eligible MIT to irrevocable elect capital account treatment for gains and losses on disposal of certain investments with effect from the 2008-09 income year. If an eligible MIT does not elect capital account treatment, then gains and losses on disposals of shares and units will be treated on revenue account.

Income Test for the Entrepreneurs' Tax Offset

As part of the 2008/09 Budget the Government announced that it would introduce an income test into the eligibility criteria for the Entrepreneurs' Tax Offset (ETO) to reduce the offset that could be claimed by those taxpayers with other significant sources of income (income not referable to the relevant small business).

In the 2009/10 Budget the Government deferred the income test's start date from 1 July 2008 to 1 July 2009 to ensure that the proposed income test commences at the same time as, and is consistent with, the Government's broader means testing reforms, also announced in the 2008/09 Budget.

Draft legislation to introduce an income test into the eligibility criteria for the ETO, together with explanatory material, is available for public comment.

Tax Laws Amendment (Foreign Source Income Deferral) Bill (No. 1) 2010

On 18 December 2009, the Assistant Treasurer released for public consultation the exposure draft legislation that will give effect to the decision to repeal the foreign investment fund (FIF) and deemed present entitlement (DPE) rules.

The repeal of the FIF and the DPE rules was announced in the 2009/10 Budget as part of wider reforms to Australia's foreign source income anti-tax-deferral (attribution) rules.

Remaining reforms to the controlled foreign company, transferor trust rules and the anti-roll-up rule are still being developed.

The New Research and Development Tax Incentive - Exposure Draft Legislation and Explanatory Materials

Exposure draft legislation and explanatory materials for the new R&D tax incentive were released for public comment on 18 December 2009.

The Government intends to introduce legislation to implement the new scheme into the Parliament in early 2010.

Forestry Managed Investment Scheme Amendments: Exposure Draft Legislation and Explanatory Material

The Assistant Treasurer, Senator the Hon Nick Sherry, has released exposure draft legislation, and associated explanatory material, on the proposed changes to the four year holding period rule for forestry managed investment schemes (MIS).

The exposure draft legislation amends the four year holding period rule for forestry MIS, as announced by the Assistant Treasurer on 21 October 2009.

Tightening the Non-Commercial Loan Rules and Explanatory Material

The Assistant Treasurer has released for public consultation the Government's exposure draft legislation and explanatory material, on changes to tighten the non-commercial loan rules in Division 7A of the ITAA 1936, as announced in the 2009/10 Budget.

The exposure draft legislation proposes changes that will prevent shareholders and their associates from avoiding tax on distributions and benefits they receive from private companies.

Broadly, the changes will extend the meaning of payment to include a lease, licence or other right to use an asset (other than a transfer of property which is already covered).

The changes will also make a number of other technical amendments to strengthen the non-commercial loan rules to ensure that they operate in accordance with their original policy intent and that they cannot be circumvented by the use of a corporate limited partnership.

Consultation Paper: Reform of the Controlled Foreign Company Rules

On 5 January 2010, the Assistant Treasurer announced the release of a consultation paper entitled: Reform of the Controlled Foreign Company Rules.

The reform of the controlled foreign company (CFC) rules was announced in the 2009/10 Budget as part of wider reforms to Australia's foreign source income anti-tax deferral attribution rules. The remaining reforms repeal the foreign investment fund (FIF) and deemed present entitlement (DPE) rules and modernise the transferor trust rules.

This consultation paper has been prepared to elicit comment on the high-level design of the taxation laws that will reform the CFC rules.

Henry Review

Government Receives the Australia's Future Tax System Review

The Government has received the report of the Australia's Future Tax System review team (the "Henry Review").

"The report will provide the foundations for a long-term plan for reform, to make our tax and transfer systems fairer, simpler and more competitive."

"As I have been saying for some time, the Government will consider the review and release it in early 2010, along with an initial response.

"The Government will not be engaging in speculation about the contents of the report before that time."

Ref: Treasurer's Press release No. 125, 23 December 2009

Jan/Feb 2010 Rulings Update

Rulings, Determinations, etc, covered in this month's Tax on the Couch

TR 2009/D8 Income tax: Division 7A loans: trust entitlements

GSTD 2009/D2 Goods and services tax: are there GST consequences where a land owner engages the services of an associate to arrange construction of residential premises for lease under an arrangement described in Taxpayer Alert TA 2009/5?

TD 2009/D17 Income tax: treaty shopping - can Part IVA of the Income Tax Assessment Act 1936 apply to arrangements designed to alter the intended effect of Australia's International Tax Agreements network?

TD 2009/D18 Income tax: can a private equity entity make an income gain from the disposal of the target assets it has acquired?

Jan/Feb 2010 Case Update

South Steyne Hotel Pty Ltd v Commissioner of Taxation [2009] FCAFC 155

The Full Federal Court has largely upheld an appeal from the Federal Court about a number of GST issues relating to the lease, sale and use of former hotel rooms that have been strata-titled as service apartments. The Court held that the order of the primary judge dismissing the entire proceeding should be set aside, instead declaring that certain sales of apartments by South Steyne (the taxpayer) was GST-free as a supply of a going concern, but that the proceeding should be otherwise dismissed. This meant that the primary judge's findings that (a) the grant of leases of apartments in hotel were input taxed supplies of residential premises (and not commercial residential premises), (b) the subsequent continuation of leases when apartments were sold were input taxed supplies, and (c) allowing an employee of a related entity to stay in the apartments was a taxable supply.

The Electrical Goods Importer and Commissioner of Taxation [2009] AATA 854

The AAT has held that a wholesale taxpayer was not entitled to reduce the consideration it received for making certain taxable supplies to retailers where it provided a "cash-back" to the customers of the retailer (or to make a decreasing adjustment if it provided a cash-back in a later period). The European notion of "fiscal neutrality" is not applicable in Australia: "In any event, it must always be remembered that the GST Act is a transaction tax in that it exacts a tax on transactions or supplies and that we are here concerned with two successive transactions, neither of which is altered or adjusted by the payment of the cash back amount. In this matter, the legislation is worded in such manner that the cash back payments to customers do not give rise to any credit in favour of the Applicant and accordingly, the objection decision under review must be affirmed."

Clark v Commissioner of Taxation [2009] FCA 1401

The Federal Court has held that the ultimate beneficiaries of a trust could establish (on the balance of probabilities) that the trust had previously unapplied net capital losses from earlier income years that could be properly applied to reduce to nil the net capital gain arising out of the disposal of properties in a later income year. The trust was not precluded from claiming the losses as a result of changes in the trust fund, the trustee's interest in the trust estate, and the interests of beneficiaries under the trust deed. That is, these events did not bring about a break in continuity between the trust estate that made the capital gain in the 2001 income year and that which suffered the capital loss in the 1993 income year.

Appeal: Commissioner of Taxation v Anstis [2009] FCAFC 154

The Commissioner has applied for special leave to appeal to the High Court against the decision of the Full Federal Court which upheld the Federal Court decision in *Anstis v FCT [2009] FCA 286* to allow a deduction under S.8-1 for self-education expenses incurred by a taxpayer whilst undertaking a university degree as an outgoing incurred in gaining an assessable Youth Allowance.

In so doing, the Full Court dismissed the Commissioner's appeal against the Federal Court decision. The Full Court held that the taxpayer was paid to undertake the course in which she was enrolled on condition that she did so in a particular manner — and to a particular standard — to satisfy the Social Security Secretary that she was making satisfactory progress towards completing the course.

In the court's view, there was nothing in the evidence to suggest that any part of the expenditure claimed was incurred prior to, or as a condition of, enrolment so as to lack a nexus with income.

Other Developments

Crackdown on Phoenix Activity

The Assistant Treasurer has issued an Australia-wide warning against fraudulent phoenix activity and released a package of tough new proposals to crackdown on businesses who rip-off of their workers and the general taxpaying community.

Fraudulent phoenix activity involves avoiding the payment of tax liabilities, wages, superannuation and leave entitlements and other responsibilities, such as supplier accounts, through the deliberate liquidation of a company.

The business in question then continues, free of liabilities, in the form of another corporate entity, controlled by the same person or group of individuals. Evidence now shows this is increasingly occurring in a systematic and sometimes cyclical manner.

The package of reforms includes:

- ensuring that there are anti-avoidance provisions in the taxation law to cancel any benefits derived through fraudulent phoenix activity;
- reinstating the failure to remit offence that would make it an offence for an entity not to remit the required PAYG Withholding amounts;
- making it an offence for directors to claim credits in relation to their own income for PAYG Withholding amounts that have not been remitted by the company of which they are a director;
- extending the promoter penalty regime to provide a disincentive to those who promote fraudulent phoenix activity;
- expanding ASIC's powers to disqualify directors;
- expanding the role of the director penalty notice to impose stricter liabilities on directors and to cover a broader range of taxes and superannuation guarantee payments;

Full details of the package of proposals can be obtained at www.treasury.gov.au.

Superannuation guidance: NTLG Superannuation Sub-group meeting – Meeting minimum pension payments

If a fund trustee fails to physically pay sufficient pension payments to meet the minimum pension obligations under SIS Regulation 1.06, is it acceptable for the fund to accrue the shortfall in its financial statements and ensure that this additional amount is paid in the following year?

While this has always been a potential problem for funds – resulting in a breach of the requisite subsection of Superannuation Industry (Supervision) Regulations 1994 (SISR) 1.06, the new provisions of ITAA 1997 make the issue a more significant one. In particular, failure to pay the minimum pension jeopardises the Fund's ability to claim exempt current pension income as this is only available to funds paying pensions that meet the requisite SIS provisions.

According to the ATO, "There is no scope within sub-regulation 1.06(9A) of the SISR whereby the definition of a pension would be met if a pension payment was made in the following year. The definition of a pension will only be satisfied where the total payments in any year meets the SISR standards."

Other issues considered in the meeting include whether a trustee of a fund can reject excess contributions under powers provided by the trust deed, and whether excess contributions tax would still apply purely as a result of an employee receiving superannuation guarantee contributions from a number of different employers.

Ref: NTLG Superannuation Technical Sub-group minutes – 8 September 2009

Release of Report into Personal Services Tax Laws

The Assistant Treasurer has released the Board of Taxation's review into whether the tax rules on the alienation of personal services income are proving effective, including in curtailing the use of sham contracting arrangements.

"The Board has concluded that while the current rules have gone some way in achieving their intention of improving integrity and equity in the tax system, the extent of this improvement is inadequate."

The Board has suggested a range of possible reform options:

- introducing a reporting obligation;
- extending the attribution rules to personal services businesses;
- clarifying and simplifying the deduction provisions;
- implementing a test of 'employee-like' manner to clarify who is affected by the rules; and/or
- introducing a deemed labour income approach.

Ref: Assistant Treasurer's Media Release No. 109

Hot Topic: The New Tax Agent Services Regime

The new tax agent services legislative package consists of the:

- *Tax Agent Services Act 2009* (TASA 2009). The TASA 2009 is the main Act. It establishes the Tax Practitioners Board and provides for the registration of tax agents and BAS agents.
- *Tax Agent Services Regulations 2009* (TAS Regulations 2009). The Regulations contain, among other things, the qualifications and relevant experience requirements for registration.
- *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act). This Act deals with the consequential and transitional matters arising from the enactment of the TASA 2009.

Although the provisions enabling the new Tax Practitioners Board to be established commenced on 26 March 2009, the remaining provisions of the new legislation that constitute the new regulatory regime for the registration of tax agents and BAS agents will commence on **1 March 2010**.

The following information is taken from the Tax Practitioners Board's "Frequently asked questions for tax agents".

What is a tax agent?

Under the new legislation, a tax agent is a person or entity registered under the TASA 2009 to provide a tax agent service.

What is a 'tax agent service'?

Under the TASA 2009, 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; 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.

A tax agent service therefore 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 *Taxation Administration Act 1953* (TAA 1953) against an assessment, determination, notice or decision under a taxation law;
- applying to the Commissioner or the Administrative Appeals Tribunal 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; and
- dealing with the Commissioner on behalf of a taxpayer.

Registration of tax agents

Only those entities providing tax agent services for a fee need to register. This means, for instance, that people providing tax agent services for their employer (and are paid a wage for their services) do not need to register.

Who can be registered as a tax agent?

The new legislation makes provision for the following to be registered as tax agents:

- individuals (including those in the capacity of a trustee of a trust);
- partnerships; and
- companies (including those in the capacity of trustee of a trust).

How do I register as a tax agent under the new legislation?

Once the provisions of the TASA 2009 and the Transitional Act relating to registration commence, you can apply to the Tax Practitioners Board for registration. You will be required to use a form approved by the Board, include any documentation required by the Board and pay the prescribed registration fee.

The TAS Regulations 2009 include fees of:

- \$500 – for registration as a tax agent who carries on a business as a tax agent; and
- \$250 – for registration as a tax agent who does not carry on a business as a tax agent.

The Tax Practitioners Board may impose one or more conditions on the registration of a tax agent concerning the subject area in which that entity provides tax agent services.

Eligibility requirements

An **individual** aged 18 years or more is eligible for registration as a registered tax agent if the Tax Practitioners Board is satisfied that the individual:

- (a) is a fit and proper person; and

- (b) meets the requirements prescribed by the regulations, including requirements relating to qualifications and experience.

A **partnership** is eligible for registration if the Board is satisfied that:

- (a) each partner who is an individual is:
- (i) aged 18 years or more;
 - (ii) a fit and proper person;
- (b) if a company is a partner:
- (i) each director of the company is a fit and proper person;
 - (ii) the company is not under external administration; AND
 - (iii) the company has not been convicted of a serious taxation offence or an offence involving fraud or dishonesty during the previous five years
- (c) the partnership has a sufficient number of individuals, being registered tax agents, to provide tax agent services to a competent standard and to carry out supervisory arrangements.

A **company** is eligible for registration if the Board is satisfied that:

- (a) each director of the company is a fit and proper person;
- (b) the company is not under external administration;
- (c) the company has not been convicted of a serious taxation offence or an offence involving fraud or dishonesty during the previous five years; and
- (d) the company has a sufficient number of individuals, being registered tax agents, to provide tax agent services to a competent standard and to carry out supervisory arrangements.

What is 'fit and proper'?

To be eligible for registration under the new legislation, the Tax Practitioners 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).

In deciding whether an individual is a fit and proper person, the Board must have regard to whether:

- the individual is of good fame, integrity and character
- an event affecting the individual's continued registration happened to the individual in the past five years
- the individual had the status of an undischarged bankrupt at any time during the previous five years
- the individual had served any part of a term of imprisonment, in whole or in part, at any time during the previous five years.

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 S.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 S.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 2001*); or

- is sentenced to a term of imprisonment.

What does a 'sufficient number of individuals' for partnerships and companies mean?

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 Tax Practitioners Board may provide further guidance on adequate staffing and supervision from time to time.

In providing such guidance, the Board may take into account factors that may include, but are not limited to the:

- size of the business;
- services being offered;
- conditions that may be imposed on the entity's registration; and
- supervisory arrangements in place.

What are the qualifications and experience requirements for tax agents under the new legislation?

To be eligible for registration as a tax agent, an individual must meet the conditions relating to one of the following requirements prescribed in Schedule 2, Part 2 of the TAS Regulations 2009:

- tertiary qualifications in accountancy
- tertiary qualifications in another discipline – specialists
- diploma or higher award
- tertiary qualifications in law
- work experience
- membership of professional association.

See Schedule 2, Part 2 of the TAS Regulations 2009.

Transitional arrangements

What happens to a tax agent's existing registration under the new legislation?

If, as of 1 March 2010, you are registered as a tax agent, your registration will continue in force and will expire on the same day that it would have expired under the old law.

You will be subject to the provisions of the TASA 2009. This includes the code of professional conduct in S.30-10 of the TASA 2009 and the civil penalty provisions in Part 5 of the TASA 2009.

What happens to a tax agent nominee's existing registration under the new legislation?

The concept of 'nominee' has been removed from the TASA 2009. Therefore, if you are currently registered as a nominee of a tax agent, you will be taken to be a registered tax agent under the new law from 1 March 2010 provided your registration does not cease before the new legislation starts. Your registration will continue as it would have under the old law – that is, for as long as the tax agent's registration under which you were registered continues in force.

You will be subject to the provisions of the TASA 2009. This includes the code of professional conduct and the civil penalty provisions.

What will happen to pre-1988 tax agents and nominees under the new legislation?

The special treatment of pre-1988 tax agents is preserved under the new law.

If you are currently registered as a tax agent or nominee of a tax agent and were an individual who was registered under Part VIIA of the ITAA 1936 immediately before the commencement of S.39 of the *Taxation Laws Amendment Act (No. 2) 1988* on 1 November 1988, you will be taken to be a registered tax agent under the new law from the day the new law comes into effect provided your registration does not cease before the new legislation starts.

You are eligible for registration as a tax agent despite not meeting the prescribed educational qualifications and relevant experience requirements for registration. You must however meet the other registration requirements.

What are the transitional arrangements for tax agent registration?

In addition to ensuring that tax agent and nominee registrations continue in force when the new law commences, during the transitional period there are three ways in which a tax agent may become registered under the new legislation.

1. Applying for tax agent registration under the TASA 2009
2. Notifying the Tax Practitioners Board under the Transitional Act
3. Applying for tax agent registration under the Transitional Act.

The Board may impose conditions on these registrations and may require the registered entity to maintain professional indemnity insurance. These entities will be subject to the provisions of the TASA 2009, except where otherwise provide by the Transitional Act (see below), including the code of professional conduct and civil penalty provisions.

1. Applying for tax agent registration under the TASA 2009

Although not strictly a transitional arrangement, it is important to note that if an applicant meets the criteria for registration as a tax agent under S.20-5 of the TASA 2009, including the requirements prescribed by the TAS Regulations 2009 (relating to qualifications and experience), they may, from 1 March 2010, apply for tax agent registration.

2. Notifying the Board under the Transitional Act

Under this transitional arrangement, an entity that notifies the Board, within the prescribed time, that the entity meets certain conditions, does not have to meet the registration requirements and will be taken to be registered for a two (2) year period beginning on 1 March 2010.

This applies to an entity that was, immediately prior to 1 March 2010, providing a 'tax agent service' within the meaning of the new law (other than a 'BAS service') but was not required to be registered as a tax agent under the old law (i.e., because under the new law the definition of 'tax agent services' has expanded).

If this transitional arrangement applies to an entity, that entity has three (3) months from 1 March 2010 to notify the Board, in the approved form, that this transitional arrangement applies to the entity.

3. Applying for tax agent registration under the Transitional Act

Under this transitional arrangement, an entity that applies for registration under the new law, within the prescribed time, and meets certain conditions, will be eligible for registration under the new law without having to satisfy certain registration requirements.

This applies to an entity that was, immediately before commencement, providing a tax agent service within a particular area of the taxation laws and was providing that tax agent service to a competent standard for a reasonable period before an application is made;

An entity must apply for registration under the new law within six (6) months from 1 March 2010 for this transitional arrangement to apply. The effect of this transitional arrangement is that the entity is not required to satisfy the registration requirements relating to:

- in the case of an individual – the requirements prescribed by the TAS Regulations 2009, including, but not limited to, requirements relating to qualifications and experience; or
- in the case of a company or partnership – the requirement that the partnership or company has a sufficient number of registered individuals to provide tax agent services and carry out supervisory arrangements.

If registered, the entity's registration will continue for a period of at least three (3) years.

Legal responsibilities of tax agents

Registered entities will be subject to the provisions of the TASA 2009. This includes the code of professional conduct in S.30-10 and the civil penalty provisions in Part 5.

It is likely that guidance in relation to these responsibilities under the new legislation will be released by the Tax Practitioners Board once the Board is established.

What is the code of professional conduct?

The code of professional conduct is a legislated code contained within the TASA 2009 which sets out the professional and ethical standards required of tax agents and BAS agents. It outlines the duties that agents owe to their clients, the Tax Practitioners Board and other agents.

The code applies to all registered tax agents and BAS agents.

Does the new legislation require a tax agent to audit clients' records?

Tax agents are only required to take reasonable care in ascertaining their clients' state of affairs to the extent that the state of those affairs is relevant to the service that they have been engaged to provide. Therefore, the requirement is subject to the scope of the engagement between a tax agent and their client.

Will a tax agent be required to maintain professional indemnity insurance?

The TASA 2009 provides that the Tax Practitioners Board may require a registered tax agent to maintain professional indemnity insurance.

The Board may specify the professional indemnity insurance a registered tax agent is required to maintain.

What are the civil penalty provisions?

Division 50 of the TASA 2009 contains civil penalty provisions. If an entity breaches a civil penalty provision, the Tax Practitioners Board may apply to the Federal Court for an order that the entity pay a pecuniary penalty.

Subject to the provisions of Division 50 of the TASA 2009, an entity will contravene a civil penalty provision if the entity:

- provides a tax agent service, including a BAS service, for a fee while not being registered under the TASA 2009 to provide that service
- advertises that they can provide a tax agent service, including a BAS service, while not being registered under the TASA 2009 to provide that service
- represents themselves as being a registered tax agent or BAS agent when, in fact, that entity is not a registered tax agent or BAS agent.

Subject to the provisions of Division 50 of the TASA 2009, where the entity is a registered tax agent or BAS agent, the entity will contravene a civil penalty provision if the entity:

- makes false or misleading statements to the Commissioner
- employs or uses the services of a de-registered entity
- signs a declaration or statement that was prepared by an unregistered entity that was not working under the supervision or control of a registered tax agent or BAS agent.

Further information

Further information will be released as it becomes available on the Tax Practitioners Board's website at www.tpb.gov.au.

ATO Hot Topic: Reforms to Income Tests

Refer to the ATO script accompanying this edition of Tax on the Couch.