
Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
APS	Australian Public Service
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
Corporations Act	<i>Corporations Act 2001</i>
CPE	continuing professional education
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
PI insurance	professional indemnity insurance
TASA 2009	<i>Tax Agent Services Act 2009</i>
TPB	Tax Practitioners Board

General outline and financial impact

Creating a regulatory framework for tax advice (financial product) services and other amendments

Schedule 1 to this Bill amends the *Tax Agent Services Act 2009* to bring entities that give tax advice in the course of advising on one or more financial products within the regulatory regime administered by the Tax Practitioners Board. This ensures the consistent regulation of all forms of tax advice irrespective of whether it is provided by a tax agent, BAS agent or an entity in the financial services industry.

In addition, Schedule 2 to this Bill makes a number of amendments to the *Tax Agent Services Act 2009* to correct a range of anomalous issues.

Date of effect: The amendments in Schedule 1 generally start from 1 July 2013 with a three year transitional period to ensure those in the financial services industry have time to adapt to the new regulatory requirements. The amendments in Schedule 2 apply from the day after this Bill receives Royal Assent

Proposal announced: On 29 November 2010, the then Assistant Treasurer and Minister for Financial Services and Superannuation released an options paper, 'Regulation of tax agent services provided by financial planners' for public consultation. Following an ongoing consultation process with industry stakeholders, these amendments were announced in the 2012-13 Mid-year Economic and Fiscal Outlook.

Financial impact: Nil.

Compliance cost impact: Medium.

Chapter 1

Creating a regulatory framework for tax advice (financial product) services and other amendments

Outline of chapter

1.1 Schedule 1 to this Bill amends the *Tax Agent Services Act 2009* (TASA 2009) to bring entities that give tax advice in the course of advising on one or more financial products within the regulatory regime administered by the Tax Practitioners Board (TPB). This ensures the consistent regulation of all forms of tax advice irrespective of whether it is provided by a tax agent, BAS agent or an entity in the financial services industry.

1.2 In addition, Schedule 2 to this Bill makes a number of amendments to the TASA 2009 to correct a range of anomalous issues.

1.3 Unless otherwise noted, all legislative references in this Chapter are to the TASA 2009.

Context of amendments

1.4 With effect from 1 March 2010, the TASA 2009 introduced a new national regulatory regime for tax agents and BAS agents to ensure that providers of tax agent services to the public meet appropriate professional and ethical standards. A sound regulatory environment gives confidence to the public about the quality of the service they receive and strengthens the integrity of the tax system.

1.5 The TASA 2009 generally requires entities that provide tax agent services to register with the TPB. The registration requirements ensure that the individuals who provide, or are accountable for, these services meet standards of fitness and propriety as well as have relevant qualifications and experience.

1.6 Different registration requirements apply to partnerships and companies to ensure they have a sufficient number of registered individuals to provide tax agent services to a competent standard and to carry out supervisory arrangements.

1.7 Entities that provide tax agent services whilst unregistered contravene the TASA 2009 and may be liable to civil penalties.

1.8 The TASA 2009 broadly defines tax agent services by reference to the following service-related elements (that the entity receiving the service can rely on):

- ascertaining the entity's tax liabilities;
- advising the entity about their tax liabilities and potential tax liabilities; or
- representing the entity in their dealings with the Commissioner of Taxation (Commissioner).

1.9 The TASA 2009 also establishes a similar regulatory regime for BAS agents. It does this by defining a BAS service as a tax agent service limited in its application to BAS provisions in the tax laws. Entities that wish to provide BAS services need to register with the TPB as a BAS agent.

1.10 In practice, a core part of well-considered and comprehensive advice on financial products will often include information about the tax implications of investing in particular products. However, the regulatory regime in the *Corporations Act 2001* (Corporations Act) that applies to entities providing financial product advice does not extend to any tax advice that these entities may provide.

1.11 As an interim measure, and to provide time to develop a suitable regulatory framework that takes into account the existing regulatory regime that applies to those in the financial services industry, the Government carved out tax agent services provided by financial services licensees and their authorised representatives from the TASA 2009 regulatory regime where the entity providing the service:

- accompanies it with a statement that they are not a registered tax agent; and
- advises the recipient that they should seek the services of a registered tax agent if they wish to rely on the advice.

1.12 This carve-out, which is provided for in the Tax Agent Services Regulations 2009, will automatically expire on 30 June 2013.

1.13 From after that date, and in the absence of any amendments, holders of an Australian financial services licence and their representatives will be liable to civil penalties if they provide tax advice

for a fee or other reward and are not registered as a tax agent with the TPB. This is because a tax agent service includes the provision tax advice.

1.14 The object of these amendments is to bring entities in the financial services industry that give tax advice within the TASA 2009 regulatory regime, whilst minimising compliance costs by avoiding regulatory overlap between the TPB and the Australian Securities and Investments Commission (ASIC). This is achieved, in part, by allowing the TPB and ASIC to share information about those entities that are regulated by both regulators.

1.15 At the same time, these amendments provide a timely opportunity to improve the TPB's administration of the TASA 2009 more generally.

1.16 After being in operation for over three years, the TPB has identified a number of amendments to the TASA 2009 that would enhance the regulatory framework and streamline a range of administrative processes.

Summary of new law

1.17 These amendments consist of two Schedules: Schedule 1 and Schedule 2.

1.18 Schedule 1 creates the new regulatory regime for entities in the financial services industry that provide tax advice. It does this by creating a new type of regulated service in the TASA 2009 — that of a *tax advice (financial product) service*. Schedule 1 consists of three Parts.

- Part 1 consists of the main amendments.
 - This Part defines a tax advice (financial product) service and incorporates it into the existing registration framework and Code of Professional Conduct that applies to registered tax agents and BAS agents.
 - Subject to the transitional arrangements in Part 3, this Part also establishes a civil penalty regime that applies to entities that provide tax advice (financial product) services whilst unregistered.
 - This Part also allows the TPB to disclose official information to ASIC.

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- Part 2 makes several consequential amendments to the *Income Tax Assessment Act 1997* (ITAA 1997) arising from the creation of this new type of service.
 - Part 3 contains the transitional provisions for entities providing tax advice (financial product) services from 1 July 2013 through to 30 June 2016.
 - This consists of an initial 18 month notification phase starting on 1 July 2013. During this time, all financial services licensees and their representatives that were providing tax advice (financial product) services immediately before 1 July 2013 and notify the TPB will be automatically registered. Once registered, entities will be subject to the Code of Professional Conduct.
 - An 18 month transitional phase, commencing on 1 January 2015, will immediately follow the notification phase. From this date, entities seeking to register with the TPB to provide tax advice (financial product) services will need to apply to (rather than notify) the TPB. However, during this transitional phase, some of the ongoing registration requirements will be relaxed.
 - The new regulatory regime will commence, in full, from 1 July 2016.

1.19 Schedule 2 addresses the anomalous issues in the TASA 2009. This includes:

- making it a registration requirement, rather than a separately imposed TPB requirement, for registered entities to maintain professional indemnity insurance (PI insurance) that meets the TPB's requirements and, for individuals renewing their registration, to meet the TPB's continuing professional education (CPE) requirements;
- allowing the TPB to not accept a registered entity's surrendered registration when that entity is subject to a current investigation;
- allowing the TPB to broaden the scope of what services constitute a BAS service, by issuing legislative guidelines;
- allowing the TPB to provide information about a registered entity (if that entity is a member of an accredited professional association) to their professional association; and

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- allowing the TPB to disclose information to the Commissioner for the purposes of administering the tax laws.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Entities that provide tax advice in the course of advising on one or more financial products will need to register with the TPB and comply with various regulatory requirements.</p> <p>Subject to the transitional rules, unregistered entities that provide tax advice in the course of advising on one or more financial products may be subject to civil penalties.</p>	<p>Holders of an Australian financial services licence and their representatives need not register with the TPB if they provide tax advice in the course of advising on one or more financial products (unless they provide a broader range of tax agent services or BAS services).</p>
<p>The TPB may also provide information to ASIC where that information is for the purpose of ASIC performing any of its functions or exercising its powers.</p>	<p>The TPB may provide information to the Commissioner and other law enforcement agencies for a range of law enforcement-related purposes.</p>

Detailed explanation of new law

Creating a regulatory framework for tax advice (financial product) services

1.20 Under the TASA 2009's existing legislative framework, entities seeking to provide tax agent services (including BAS services) for fee or other reward need to first register with the TPB to avoid potential civil penalties. These amendments adopt the same approach for entities seeking to provide *tax advice (financial product) services*.

1.21 The amendments do this by defining a tax advice (financial product) service and then extending, as applicable, the current registration framework that applies to registered tax agents and registered BAS agents to entities registered to provide tax advice (financial product) services.

1.22 The amendments define this new type of registered entity as a *registered tax (financial product) adviser*.

What is a tax advice (financial product) service?

1.23 Subject to some exceptions, the Corporations Act generally requires entities that carry on a business of providing financial services to be a financial services licensee unless they provide the financial service as a representative of another licensee. The provision of financial product advice will typically be a financial service.

- ‘Financial product’ has the meaning given by Division 3, Part 7.1 of Chapter 7 of the Corporations Act.
- ‘Financial product advice’ is defined in section 766B of the Corporations Act.
- ‘Financial services licensee’ is defined in Chapter 7 of the Corporations Act.
- ‘Representative’ (of a financial services licensee) is defined in paragraph 910A(a) of the Corporations Act.

1.24 As its name suggests, a tax advice (financial product) service consists of two key elements — that of providing ‘tax advice’ and providing that advice in relation to ‘financial products’.

Tax advice

1.25 Similar to the legislative approach in section 90-10 in defining a BAS service, a tax advice (financial product) service is defined as a type of a tax agent service. This integrates this new type of service within the existing legislative framework where the concept of a tax agent service defines those types of services to be regulated by the TPB. To the extent that an entity giving tax-related factual advice is not providing a tax agent service, then that advice will similarly not be a tax advice (financial product) service — even if it is given in the course of advising on one or more financial products.

1.26 However, a tax advice (financial product) service does not incorporate all three elements of a tax agent service. As such, the key tax-related differences between a tax agent service and a tax advice (financial product) service is that the latter services can only relate to:

- ascertaining an entity’s actual, or potential, tax liabilities, obligations or entitlements under a tax law; or
- advising an entity about their actual, or potential, tax liabilities, obligations or entitlements under a tax law.

[Schedule 1, Part 1, item 46, paragraph 90-15(a)]

1.27 In effect, this means that an entity who wishes to represent a taxpayer in their dealings with the Commissioner will provide more than a tax advice (financial product) service. Entities that wish to provide such a service will therefore have to register with the TPB as a registered tax agent (or a BAS agent if applicable).

Example 1.1

Tim advises a range of individuals about their tax affairs and prepares and lodges their income tax returns with the Commissioner. One of his clients is Lachlan. Tim advises Lachlan about his tax affairs and, on his behalf, subsequently prepares his tax return and lodges it with the Commissioner.

Tim is providing Lachlan with a tax agent service.

Relating to financial products

1.28 In addition, the service must be given in the course of advising on one or more financial products, as defined in the Corporations Act. This provides a regulatory link to the Corporations Act and ensures that existing registered tax agents and BAS agents, unless they are otherwise advising on financial products, do not inadvertently provide tax advice (financial product) services. [*Schedule 1, Part 1, item 42 and item 46, paragraph 90-15(a)*]

Example 1.2

Katrina provides her clients with a range of advisory services, including advice on various financial products. James is one of Katrina's clients. Katrina advises James about the potential tax consequences of investing in various financial products.

Katrina is providing James with a tax advice (financial product) service.

Example 1.3

Further to Example 1.1.

Even though Tim is providing tax agent services to Lachlan, as he is not providing this service in the course of advising on one or more financial products, Tim is not providing Lachlan with a tax advice (financial product) service.

Other service-related aspects

1.29 Consistent with the broader definition of a tax agent service (including a BAS service), an entity will only provide a tax advice

(financial product) service in circumstances where the entity receiving the service can reasonably expect to rely on it to:

- satisfy obligations or liabilities that arise, or could arise, under the tax laws;
- claim entitlements that arise, or could arise, under the tax laws; or
- satisfy obligations or liabilities and claim entitlements that arise, or could arise, under the tax laws.

[Schedule 1, Part 1, item 46, paragraph 90-15(b)]

1.30 It will be a matter of fact as to whether an entity has provided a tax advice (financial product) service. However, as the relevant test is whether the entity could reasonably expect to rely on the advice to satisfy obligations or claim entitlements under the tax laws, there is no need for the obligations or entitlements to actually arise. As such, it is irrelevant if the entity receiving the service subsequently chooses not to invest in the relevant financial products in determining if they received a tax advice (financial product) service.

Example 1.4

Further to Example 1.2.

Katrina advises James that if he was to invest in a specific financial product then he would receive income of \$15,000 and that this would give rise to a \$5,000 tax liability.

Even if James chooses not to invest in this particular financial product, Katrina has provided James with a tax advice (financial product) service.

Registering with the TPB to provide tax advice (financial product) services

1.31 The eligibility framework for individuals, partnerships and companies seeking to be registered tax (financial product) advisers is the same as for those entities seeking to be registered tax agents and registered BAS agents. This includes satisfying the fit and proper person test. Consistent with the existing legislative approach in relation to individual tax agents or BAS agents, specific eligibility requirements, such as those relating to qualifications and experience, will be prescribed by the regulations. *[Schedule 1, Part 1, items 3, 4, 5 and 7]*

1.32 Partnerships and companies will have to satisfy the TPB that they have a sufficient number of individuals, who are registered as either tax (financial product) advisers or tax agents, to be able to provide tax advice (financial product) services to a competent standard and to carry out supervisory arrangements. *[Schedule 1, Part 1, items 6 and 8]*

Example 1.5

Diana, Erin and Jamie are the directors of Financial and Investments Ltd, an entity that is a financial services licensee. Financial and Investments Ltd applies to the TPB to be registered as a tax (financial product) adviser.

In deciding whether to grant Financial and Investments Ltd's application, the TPB has to have regard as to whether:

- Diana, Erin and Jamie are all over 18 years of age and are all fit and proper persons;
- Financial and Investments Ltd is not under external administration;
- Financial and Investments Ltd has been convicted of a serious tax offence or an offence involving fraud or dishonesty in the past five years; and
- Financial and Investments Ltd has a sufficient number of individuals who are either registered as tax agents or tax (financial product) advisers to provide tax advice (financial product) services to a competent standard and to carry out supervisory arrangements.

1.33 Factors which may be relevant in determining if a partnership or a company has a sufficient number of registered individuals include:

- the size of the entity;
- the services offered by the entity;
- the supervisory arrangements in place within the entity; or
- the type of services that the entity can provide.

1.34 The ability for partnerships and companies to use registered tax agents to satisfy the TPB that they can provide tax advice (financial product) services to a competent standard and carry out supervisory arrangements is consistent with the existing approach in relation to partnerships and companies registering as tax agents or BAS agents.

1.35 Entities that apply to be registered tax (financial product) advisers will need to do so in a form approved by the TPB. [*Schedule 1, Part 1, item 10*]

1.36 Applications will need to be accompanied by the prescribed application fee. This will be prescribed by the regulations. [*Schedule 1, Part 1, item 10*]

1.37 The TPB may also impose conditions on an entity's registration as a tax (financial product) adviser. [*Schedule 1, Part 1, item 11*] The TPB may, on application from the registered tax (financial product) adviser, subsequently modify these conditions if it considers it appropriate to do so. [*Schedule 1, Part 1, item 13*] Section 70-10 provides that the TPB's decisions in relation to either matter may be reviewed by the Administrative Appeals Tribunal (AAT).

Ongoing registration requirements and the Code of Professional Conduct

1.38 The TASA 2009 imposes a range of obligations, including a Code of Professional Conduct on registered tax agents and registered BAS agents. Registered tax (financial product) advisers will be subject to the same obligations.

1.39 Of note, the TASA 2009 also imposes specific obligations in relation to tax agent services provided by registered tax agents and registered BAS agents. For example, subsection 30-10(7) requires registered entities to provide tax agent services competently. These obligations will automatically apply to services provided by registered tax (financial product) advisers as a tax advice (financial product) service is defined as a type of tax agent service.

1.40 This means, for example, that registered tax (financial product) advisers will need to:

- act honestly and with integrity;
- comply with the tax laws in conducting their personal affairs;
- act lawfully and in the best interests of their clients;
- have in place adequate arrangements for managing conflicts of interests;
- maintain client confidentiality except where otherwise required by law or permitted by the client;
- provide services competently;

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- not knowingly obstruct the proper administration of the tax laws; and
 - respond to requests and directions from the TPB in a timely, responsible and reasonable manner.

[Schedule 1, Part 1, items 15 and 16]

1.41 Registered tax (financial product) advisers that do not comply with these statutory obligations may be subject to a range of administrative sanctions by the TPB, ranging from a written caution through to suspension or termination of their registration. *[Schedule 1, Part 1, items 17, 18 and 19]*

1.42 In addition, a range of other events may affect an entity's continued registration as a registered tax (financial product) adviser. These include:

- being convicted of a serious tax offence or an offence involving fraud or dishonesty;
- being penalised for being a promoter of a tax exploitation scheme or for implementing a scheme, that has been promoted as conforming with a product ruling, in a way that is materially different from the ruling;
- becoming an undischarged bankrupt or going into external administration; or
- being sentenced to a term of imprisonment.

[Schedule 1, Part 1, item 14]

Potential civil penalties that may apply to registered tax (financial product) advisers

1.43 Consistent with the existing civil penalty provisions that apply to registered tax agents and registered BAS agents, registered tax (financial product) advisers may be liable to a civil penalty if they:

- employ or use the services of a previously registered tax (financial product) adviser or a previously registered tax agent; and
- know, or ought to reasonably know, that the previously registered entity's registration had been terminated within the previous year.

The maximum penalty for each contravention is 250 penalty units for individuals and 1,250 penalty units for body corporates. [*Schedule 1, Part 1, items 28 and 29*]

1.44 Subsection 4AA(1) of the *Crimes Act 1914* provides for the value of penalty units. Of note, the current penalty unit value is \$170.

1.45 Registered tax agents and registered BAS agents may also be subject to civil penalties if they make false or misleading statements to the Commissioner or sign declarations that are required or permitted by the tax laws. However, as a tax advice (financial product) service does not extend to representing entities in their dealings with the Commissioner, there is no need for these additional civil penalty provisions to apply to registered tax (financial product) advisers. As noted in paragraph 1.27, registered tax (financial product) advisers that provide these services would be providing broader tax agent services and so should register with the TPB as a registered tax agent.

Giving effect to the co-regulatory regime between the TPB and ASIC

The role of the TPB

1.46 The TPB has the function of administering the system for the registration of registered tax (financial product) advisers. [*Schedule 1, Part 1, item 32*]

1.47 As part of its administration of this system, and consistent with the TPB's obligations in relation to administering the system for the registration of registered tax agents and registered BAS agents, the TPB will need to:

- maintain a register of registered tax (financial product) advisers and those that have been deregistered in specific circumstances [*Schedule 1, Part 1, items 36-38*];
- publish in the Gazette its decisions to terminate or suspend an entity's registration as a registered tax (financial product) adviser [*Schedule 1, Part 1, item 39*]; and
- notify the Commissioner about its decision to register an entity as a registered tax (financial product) adviser or terminate an entity's registration [*Schedule 1, Part 1, items 12 and 20*].

Sharing information with ASIC

1.48 These amendments facilitate an effective co-regulatory regime by allowing the TPB to disclose official information to ASIC.

1.49 Specifically, it will not be an offence for current or former:

- members of the TPB;
- Australian Public Service (APS) employees whose services are made available to the TPB by the Commissioner; and
- other individuals who are employed by the TPB or who provide services to the TPB;

to disclose, or make records of, official information they acquired in the course of their duties to ASIC for the purposes of ASIC performing any of its functions or exercising its powers. [*Schedule 1, Part 1, item 40*]

1.50 In addition, the TPB will be obliged to notify ASIC:

- about its decision to register an entity as a registered tax (financial product) adviser [*Schedule 1, Part 1, item 12*];
- about its decision to terminate an entity's registration as a registered tax (financial product) adviser [*Schedule 1, Part 1, item 20*]; and
- following an investigation into a registered tax (financial product) adviser or tax advice (financial product) services provided by a tax agent — about its decisions or findings and the relevant reasons [*Schedule 1, Part 1, items 33-35*].

Potential civil penalties that may apply to unregistered entities providing tax advice (financial product) services

1.51 Consistent with the existing civil penalty provision that applies to unregistered entities providing tax agent services or BAS services, an entity may be liable to a civil penalty if:

- they are not a registered tax (financial product) adviser or a registered tax agent; and
- they knowingly provide a tax advice (financial product) service (or ought to know they are providing such a service) for a fee or other reward.

If the entity provides the service as a legal service, then they may be liable to a civil penalty if they are prohibited from providing such a service under a State or Territory law that regulates legal practice and legal services. The maximum penalty for each contravention of improperly providing a tax advice (financial product) service is 250 penalty units for

individuals and 1,250 penalty units for body corporates. [*Schedule 1, Part 1, item 23*]

Example 1.6

Amelia provides advice to her clients about the tax consequences of investing in various financial products in return for a set fee. Amelia is not a registered tax (financial product) adviser, a registered tax agent or a legal practitioner.

As Amelia is providing tax advice (financial product) services whilst unregistered, she is contravening the TASA 2009 and is liable for civil penalties.

Example 1.7

Dominique, a registered tax agent and financial services licensee, provides her clients with a range of advisory services (including in relation to financial products) in return for set fees.

Dominique advises one of her clients, Leo, about the tax consequences of investing in various financial products. Even though Dominique is providing a tax advice (financial product) service for a fee or other reward, Dominique is not contravening the TASA 2009 as she is a registered tax agent.

1.52 Consistent with the existing civil penalty provision that applies to unregistered entities advertising tax agent services or BAS services, an entity may be liable to a civil penalty if:

- they are not a registered tax (financial product) adviser or registered tax agent; and
- they advertise that they will provide a tax adviser (financial product) service.

If the entity advertises they will provide the service as a legal service, then they may be liable to a civil penalty if they are prohibited from providing such a service under a State or Territory law that regulates legal practice and legal services. The maximum penalty for each contravention of improperly advertising a tax advice (financial product) service is 50 penalty units for individuals and 250 penalty units for body corporates. [*Schedule 1, Part 1, item 25*]

1.53 Consistent with the existing civil penalty provision that applies to unregistered entities that represent they are a registered tax agent or a registered BAS agent, an entity may be liable to a civil penalty if:

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- they represent that they are a registered tax (financial product) adviser; and
 - that representation is untrue.

The maximum penalty for each contravention is 50 penalty units for individuals and 250 penalty units for body corporates. [*Schedule 1, Part 1, items 26 and 27*]

Other amendments to incorporate tax adviser (financial product) services with the existing regulatory regime

1.54 These amendments carve out entities that provide tax advice (financial product) services from the civil penalty provisions that would otherwise apply to unregistered tax agents for providing tax agent services for fee or other reward or advertising to provide tax agent services. [*Schedule 1, Part 1, items 22 and 24*]

1.55 These amendments allow the regulations to provide for a system for the TPB to accredit professional associations for the purposes of recognising relevant professional qualifications and experience for the registration of registered tax (financial product) advisers. [*Schedule 1, Part 1, item 9*]

1.56 These amendments update the objects clause and other guide material in the TASA 2009 so that references to tax agents and BAS agents also refer to tax (financial product) advisers. [*Schedule 1, Part 1, items 1, 2, 15, 21, 30 and 31*]

1.57 In addition, these amendments insert a range of tax adviser (financial product) service and tax (financial product) adviser definitions in the dictionary in section 90-1. [*Schedule 1, Part 1, items 41-45*]

Other amendments to the *Tax Agent Services Act 2009*

New registration requirements

Maintaining professional indemnity insurance

1.58 Subsection 20-30(3) allows the TPB to give written notice to registered tax agents and registered BAS agents requiring them to hold PI insurance that meets the TPB's requirements. Subsection 30-10(13) then requires these entities to maintain PI insurance as an ongoing Code of Professional Conduct requirement.

1.59 These amendments replace subsection 20-30(3) with a new ongoing registration requirement for individuals, partnerships and companies that the relevant entity maintains PI insurance that meets the

TPB's requirements. Maintaining PI insurance will continue to be an ongoing Code of Professional Conduct requirement. [*Schedule 2, item 1, paragraph (c) and items 2-4 and 14*]

Example 1.8

Liza applies to the TPB for registration as a registered tax agent.

In addition to having to satisfy the TPB that she is a fit and proper person and that she can meet the registration requirements (prescribed by the regulations), Liza will need to satisfy the TPB that, once registered, she will be able to maintain PI insurance that meets its requirements.

1.60 In substance, these new registration requirements do not affect the obligations on registered entities to hold PI insurance — as, under subsection 20-30(3), the TPB can write to registered entities requiring them to maintain PI insurance as specified in the notice. Instead, the amendments streamline the current administrative procedures relating to maintaining PI insurance by incorporating it into the registration process.

Satisfying continuing professional education requirements

1.61 In addition, these amendments make it a registration requirement for individuals seeking to renew their registration to have met the TPB's CPE requirements. This ensures that registered individuals maintain their skills and knowledge for the benefit of their clients. [*Schedule 2, item 1 paragraph (d)*]

Allowing the TPB to not accept an entity's surrendered registration

1.62 Under paragraph 40-5(2)(a) the TPB must terminate an individual tax agent or BAS agent's registration if that individual surrenders their registration to the TPB in writing. Subsection 40-10(2) and paragraph 40-15(2)(a) similarly apply to registered partnerships and registered companies surrendering their registration.

1.63 As a result, these provisions effectively allow registered entities that are subject to an investigation by the TPB to avoid the consequences of that investigation by surrendering their registration.

1.64 These amendments provide the TPB with the opportunity to not accept a registered entity's surrendered registration in circumstances when:

- that entity is subject to a current investigation by the TPB or was subject to a previous investigation by the TPB; and

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- the TPB considers it would be inappropriate to accept the entity's surrendered registration and therefore terminate the entity's registration.

[Schedule 2, items 8-10]

Example 1.9

Paris, a registered BAS agent, completes business activity statements for her clients and, on their behalf, lodges them with the Commissioner.

However, Paris fails to provide her clients with a competent service and a number of them complain to the TPB. As a result, the TPB decides to investigate Paris.

Paris subsequently seeks to terminate her registration by surrendering it in writing to the TPB. However, due to its current investigation, the TPB considers it would be inappropriate to terminate Paris's registration and so decides not to terminate it.

1.65 The TPB will need to exercise its judgement in deciding whether to not accept an entity's surrendered registration and this decision will need to be informed by the available information at that point in time. Relevant information could include:

- the registered entity's reasons for wanting to surrender their registration;
- the nature of any complaints against the registered entity;
- the availability of evidence and other information relevant to the investigation;
- the priority of the investigation relative to the TPB's other work; and
- the need to protect consumers.

1.66 Application to review a decision by the TPB to not terminate an entity's registration may be made to the AAT. *[Schedule 2, item 15]*

Allowing the TPB to notifying accredited professional associations

1.67 After conducting an investigation into a registered entity, the TPB needs to notify the following entities under subsection 60-125(8) about its decision or findings:

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- the entity affected by the decision or finding;
 - the complainant (if any); and
 - if the decision or finding is relevant to the administration of the taxation laws — the Commissioner.

1.68 If the investigated registered entity is a member of a professional association accredited by the TPB under the regulations, then these amendments require the TPB to notify the professional association about its decision or finding and relevant reasons. This will improve the interactions between the TPB and professional associations in dealing with inappropriate behaviour. *[Schedule 2, items 12 and 13]*

Example 1.10

Further to Example 1.9.

The TPB completes its investigation into Paris and finds that her conduct has breached the Code of Professional Conduct. As a result, the TPB decides to terminate Paris's registration as a BAS agent and decides, per section 40-25, that she may not to apply to be registered as a BAS agent for the following two years.

Assume Paris is a voting member of the BAS Agents Alliance, which is an accredited professional association. Consequently, the TPB needs to notify the BAS Agents Alliance about its finding in relation to Paris's conduct and the reasons for this finding.

Allowing the TPB to provide a wider range of information to the ATO

1.69 Section 70-40 provides a range of exceptions to the general prohibition against members of the TPB and other relevant individuals from disclosing official information that they acquire in the course of their duties in administering the TASA 2009. These exceptions facilitate efficient and effective government administration and law enforcement. Specifically, subsection 70-40(3) allows disclosures of official information to the Commissioner for a range of law-enforcement purposes including investigating tax offences and investigating contraventions of civil penalty provisions.

1.70 These amendments replace the existing specific purposes with a general purpose — that of administering a taxation law. As a result, records made, or disclosures of, official information to the Commissioner will not be an offence where the record or disclosure is for the purpose of the Commissioner administering a taxation law. As it is not generally practical to provide the information to the Commissioner personally, it

may be provided to an Australian Taxation Office (ATO) officer on behalf of the Commissioner. [*Schedule 2, item 17*]

Example 1.11

Philippe applies to the TPB to a registered tax agent and provides his contact details to the TPB. Six months later he moves to new premises with a new address and phone number and provides these new contact details to the TPB.

The disclosure of Philippe's contact details to an ATO officer to allow the ATO to update its contact details for Philippe is not an offence.

Example 1.12

Rita, a registered tax agent is the subject of a TPB investigation in response to allegations that she has been lodging a number of false income tax returns.

During its investigation, the TPB becomes aware of information that would be relevant for the Commissioner's administration of the taxation laws.

As this information relates to the administration of the taxation laws, the disclosure of the official information to an ATO officer is not an offence.

1.71 This general purpose, 'for the purpose of administering a taxation law' is a broad concept that includes both direct and indirect methods of ensuring or encouraging compliance with the taxation laws. Disclosure of information to assist the ATO initiate enforcement action, including a prosecution under other Acts, such as the *Criminal Code Act 1995*, in relation to an underlying breach of a taxation law is for the purposes of administering a taxation law.

Example 1.13

Paula, an ATO officer, is investigating a tax agent who she suspects has been lodging deliberately false income tax returns. Paula considers that a prosecution under the *Criminal Code Act 1995* may be an appropriate means of addressing the alleged breaches of the taxation law. In compiling a brief of evidence to the Commonwealth Director of Public Prosecutions, Paula requests official information from the TPB.

As Paula's investigation is for the purposes of administering a taxation law, the TPB's disclosure of this official information to Paula is not an offence.

Example 1.14

Alex, an ATO officer in the ATO's superannuation area, is examining if a registered tax agent should be disqualified under section 131 of the *Superannuation Industry (Supervision) Act 1993* from being an approved superannuation auditor in relation to the auditing of self-managed superannuation funds. As part of this examination, Alex requests official information from the TPB.

As the Commissioner has the general administration of section 131 of the *Superannuation Industry (Supervision) Act 1993* in relation to self-managed superannuation funds, and Alex's determination is for the purpose of administering a taxation law, the TPB's disclosure of this official information to Alex is not an offence.

Example 1.15

Scott, an ATO officer is investigating an alleged tax avoidance scheme promoted by a registered tax agent. Scott requests official information from the TPB that he believes could assist his investigation. Scott intends to use this information to pursue an order under the *Proceeds of Crime Act 2002* as one of the means to address any breaches of the taxation laws.

As this information relates to the administration of a taxation law, the TPB's disclosure of this official information to Scott is not an offence.

1.72 Allowing the TPB to provide this additional information to the Commissioner improves the ATO's administration of the taxation laws.

Allowing the TPB to specify additional types of BAS service

1.73 Section 90-10 sets out what constitutes a BAS service — essentially, it is a tax agent service that relates to a BAS provision in the tax laws. At the same time, paragraph 60-15(d) allows the TPB to issue guidelines (in the form of legislative instruments) to assist in administering the system for the registration of tax agents and BAS agents.

1.74 To provide ongoing flexibility as to what constitutes a BAS service and ensure that the regulatory framework continues to reflect industry practice, these amendments allow the TPB to issue legislative instruments that specify any other services that are to also be BAS services. [*Schedule 2, item 19*]

Other amendments

Registered entities to provide the TPB with various contact details

1.75 Under subsection 30-35 registered tax agents and registered BAS agents that cease to meet specific registration requirements or other events happen to them that affect their continued registration need to notify the TPB in writing within 30 days.

1.76 These amendments will also require registered entities to advise the TPB in writing about any changes to their business address, email address and other contact details. [*Schedule 2, items 5-7*]

1.77 Registered entities that fail to comply with these obligations will no longer meet an ongoing registration requirement and, as a result, could have their registration terminated by the TPB. These entities may also be in breach of the Code of Professional Conduct because they are not complying with the tax laws in the conduct of their personal affairs as required by section 30-10(2).

Evidential burdens in civil penalty provisions

1.78 An entity contravenes section 50-5 if they provide a tax agent service whilst unregistered by the TPB. An entity contravenes section 50-10 if they advertise they will provide a tax agent service and they are similarly unregistered.

1.79 Subsection 50-5(5) imposes an evidential burden on entities to show in a civil penalty proceeding, that — per subsection 50-5(3) and 50-5(4) — the reason they did not contravene section 50-5 is that they were providing a legal service in the course of acting for a trust or deceased estate as trustee or legal personal representative.

1.80 Even though subsections 50-10(3) and 50-10(4) provide an equivalent exception in relation to a potential contravention of section 50-10, there is no equivalent evidential burden on the entity to show that the reason they did not contravene section 50-10 is that they were providing a legal service in the course of acting for a trust or deceased estate as trustee or legal personal representative.

1.81 These amendments amend section 50-10 to impose an equivalent evidential burden to that contained in subsection 50-5(5) in relation to subsections 50-10(3) and 50-10(4). [*Schedule 2, items 11 and 18*]

Allowing the TPB to delegate its functions

1.82 Subject to some limitations, section 70-30 allows the TPB to delegate its functions or powers to a single Board member or committee.

The limitations relate to the TPB's function to issue guidelines, establish Committees or make decisions that may be reviewed by the AAT.

1.83 These amendments will also allow the TPB to also delegate its functions and powers to:

- APS employees whose services are made available to the TPB by the Commissioner; and
- other individuals engaged by the TPB.

[Schedule 2, item 16]

1.84 Allowing the TPB to make these delegations will improve its administrative effectiveness.

Application and transitional provisions

Creating a regulatory framework for tax advice (financial product) services

1.85 These amendments will commence on Royal Assent.

1.86 These amendments will start to apply from 1 July 2013, subject to the following transitional arrangements. The consequence of these transitional arrangements is that the new regulatory regime for tax advice (financial product) services will not commence in full until 1 July 2016.

The notification phase — 1 July 2013 until 31 December 2014

1.87 From 1 July 2013 until 31 December 2014, entities that were either a financial services licensee or a representative of a licensee as at 30 June 2013 may register as a tax (financial product) adviser with the TPB. To register, the entity need only notify the TPB that, immediately before 1 July 2013, they:

- were a financial services licensee or a representative of a licensee; and
- were providing tax advice (financial product) services.

[Schedule 1, item 50 and item 51, subsection (1)]

1.88 The TPB may determine the form of the notification, including what information or documents are required. *[Schedule 1, item 51, subsection (2)]*

1.89 Regardless of when the entity notifies the TPB during this time, they will be taken to be registered for three years from 1 July 2013.
[Schedule 1, item 51, subsection (1)]

Example 1.16

Janette, a representative of a financial services licensee, started providing tax advice (financial product) services in January 2013. On 1 September 2013 she notifies the TPB in the necessary form that, immediately before 1 July 2013, she was:

- a representative of a financial services licensee; and
- providing a tax advice (financial product) services.

Janette is taken to be a registered tax (financial product) adviser from 1 July 2013.

1.90 Once registered, the entity will be subject to the Code of Professional Conduct and the other ongoing requirements imposed on registered tax (financial product) advisers, including maintaining PI insurance and any registration conditions imposed by the TPB.
[Schedule 1, item 51, subsection (3)]

1.91 During the notification phase, unregistered entities that provide, or advertise that they will provide, a tax advice (financial product) service will not be liable for any civil penalties under the TASA 2009.

The transitional phase — 1 January 2015 until 30 June 2016

1.92 Starting from 1 January 2015, entities may apply to the TPB to be registered as a tax (financial product) adviser. However, unlike the notification phase, the entity will only become registered once the TPB makes its decision to register the entity and notifies them of this. Once the TPB makes a decision to register the entity, the entity will be registered for at least three years.

1.93 Also starting from 1 January 2015, entities that are not registered tax (financial product) advisers or registered tax agents will contravene the TASA 2009 if they:

- provide tax advice (financial product) services; or
- advertise that they will provide tax advice (financial product) services.

Similarly, entities that misrepresent that they are a registered tax (financial product) adviser will also contravene the TASA 2009.

Paragraphs 1.51-1.53 provide further information on these civil penalty provisions.

1.94 From 1 January 2015 to 30 June 2016, any entity that has not registered as a tax (financial product) adviser during the notification phase may apply to the TPB to be registered without having to satisfy all of the ongoing registration requirements that would otherwise apply from 1 July 2016 (when the new framework applies in full).

- Individuals need only satisfy the TPB that they have sufficient experience to be able to provide tax advice (financial product) services to a competent standard rather than satisfy any specific registration requirements prescribed by the Regulations.
- Partnerships and companies need only satisfy the TPB that they have sufficient experience to be able to provide tax advice (financial product) services to a competent standard rather than satisfy the requirement to have a sufficient number of registered tax (financial product) advisers or registered tax agents to provide tax advice (financial product) services to a competent standard and carry out supervisory arrangements.

[Schedule 2, items 50 and 52]

Example 1.17

Misha, a representative of a financial services licensee, applies to the TPB to be registered a tax (financial product) adviser on 23 February 2015. The TPB considers Misha's application and grants her registration on 31 March 2015.

Misha is taken to be a registered tax (financial product) adviser from 31 March 2015 for at least three years.

Transitional regulations

1.95 To provide flexibility during the transitional phase, the amendments provide for the Governor-General to make regulations prescribing matters required or permitted to be prescribed and which are necessary or convenient to be prescribed. *[Schedule 1, item 53]*

Other amendments to the *Tax Agent Services Act 2009*

1.96 These amendments will commence on Royal Assent and will apply from the following day. *[Schedule 2, items 20 and 21]*

Consequential amendments

Creating a regulatory framework for tax advice (financial product) services

1.97 These amendments amend the definitions in section 995-1 of the ITAA 1997 to incorporate, where relevant, the term tax (financial product) adviser. *[Schedule 1, Part 2, items 47, 48 and 49]*