



Australian Government



TAX PRACTITIONERS BOARD

Tax Agent Services (Specified BAS Services) Instrument 2016

Explanatory Statement

General outline of this instrument

1. This legislative instrument (the **Legislative Instrument**) is made under subsection 90-10(1A) of the *Tax Agent Services Act 2009* (TASA 2009).
2. The Legislative Instrument declares, for the purposes of the definition of a Business Activity Statement (BAS) service, as contained in section 90-10 of the TASA 2009, certain services as a BAS service.
3. The Legislative Instrument is a legislative instrument for the purposes of the *Legislation Act 2003* (LA 2003).
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Commencement and application of this instrument

5. The Legislative Instrument commences on the day after it is registered on the Federal Register of Legislation under the LA 2003 and applies to registered BAS agents.
6. The application of the Legislative Instrument does not adversely affect the ability of registered BAS agents to provide BAS services. The effect of the Legislative Instrument is to extend the scope of services that registered BAS agents can provide by expanding the definition of a BAS service.

What is this instrument about?

7. The Legislative Instrument declares, for the purposes of subsection 90-10(1A) of the TASA 2009, the following services to be a BAS service:
- (a) a service under the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992) to the extent that the service relates to a payroll function or payments to contractors;
 - (b) a service under the *Superannuation Guarantee Charge Act 1992* (SGCA 1992);
 - (c) a service under Part 3B of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993);
 - (d) a service under Part 5-30 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953);
 - (e) a service under sections 202CD and 202CF of the *Income Tax Assessment Act 1936* (ITAA 1936); or
 - (f) a service under section 9 of the *A New Tax System (Australian Business Number) Act 1999* (ABN Act 1999).

What is the effect of this instrument?

8. The effect of the Legislative Instrument is to allow registered BAS agents to provide certain services, that they would otherwise be unable to lawfully provide, without the requirement to be a registered tax agent.
9. In particular, the Legislative Instrument allows the services listed in paragraph 7 above, which can be provided by a registered tax agent, to also be provided by a registered BAS agent.

Compliance cost impacts

10. No negative regulatory compliance costs or practical impacts are expected, as BAS agents are currently already undertaking this work. Further, no regulatory compliance costs were identified by Government as part of the amendments to the TASA 2009 to allow the TPB to declare certain services as BAS services.

Background

11. Under the TASA 2009, an entity must generally register as a BAS agent if they provide a BAS service for a fee or other reward (section 50-5 of the TASA 2009). BAS service is defined in section 90-10 of the TASA 2009 as follows:

90-10 Meaning of BAS service

- (1) A BAS service is a ^{*}tax agent service:
- (a) that relates to:
 - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a ^{*}BAS provision; or

- (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a BAS provision; or
- (iii) representing an entity in their dealings with the Commissioner in relation to a BAS provision; and

(b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

- (i) to satisfy liabilities or obligations that arise, or could arise, under a BAS provision;
- (ii) to claim entitlements that arise, or could arise, under a BAS provision.

(1A) The Board may, by legislative instrument, specify that another service is a *BAS service*.

(2) A service specified in the regulations for the purposes of this subsection is not a *BAS service*.

Note: For specification by class, see subsection 13(3) of the *Legislation Act 2003*.

12. BAS provision is defined by reference to section 995-1 of the ITAA 1997 as follows:

"BAS provisions" means:

- (a) Part VII of the *Fringe Benefits Tax Assessment Act 1986* ; and
- (b) the * indirect tax law; and
- (c) Parts 2-5 and 2-10 in Schedule 1 to the *Taxation Administration Act 1953* (which are about the PAYG system).

Note: BAS stands for Business Activity Statement.

13. In early 2010, the TPB identified services that were, and continue to be, commonly provided by BAS agents that do not fall within the definition of a BAS provision (and therefore also do not fall within the definition of a BAS service). The TPB considers it appropriate that these services be included in the services that BAS agents are permitted to provide.

14. On 30 June 2013, the TASA 2009 was amended to give the TPB the ability to declare a service, by way of a legislative instrument, to be a BAS service.

15. The explanatory memorandum to the Tax Laws Amendment Bill 2013 explains that the purpose of the amendment was to provide ongoing flexibility to the TPB as to what constitutes a BAS service.

16. The Legislative Instrument allows BAS agents to lawfully provide certain services that extend beyond the legislative definition of BAS provisions but which the TPB considers appropriate that BAS agents be permitted to provide.

Explanation

17. The Legislative Instrument ensures that BAS agents can provide BAS services that are not solely in relation to a BAS provision, as defined in section 995-1 of the ITAA 1997.
18. The services listed in paragraph 7 above fall within the definition of a tax agent service in section 90-5 of the TASA 2009 as they relate to a taxation law (as defined in section 995-1 of the ITAA 1997).
19. Therefore, in the absence of the TPB declaring (by way of a legislative instrument) the services listed in paragraph 7 above as a BAS service under the TASA, under the law these services could only be provided by a registered tax agent.
20. Once the Legislative Instrument has commenced, a registered BAS agent will be able to lawfully provide the following:
- a service under the SGAA 1992 to the extent that the service relates to a payroll function or payments to contractors;
 - a service under the SGCA 1992;
 - a service under Part 3B of the SISA 1993;
 - a service under Part 5-30 in Schedule 1 to the TAA 1953;
 - a service under sections 202CD and 202CF of the ITAA 1936; or
 - a service under section 9 of the ABN Act 1999.
21. This Legislative Instrument does not alter the fact that all registered BAS agents are bound by the Code of Professional Conduct in the TASA 2009. In particular, section 30-10 of the TASA 2009, under the heading of 'Competence', provides:
- (7) You must ensure that a *tax agent service that you provide, or that is provided on your behalf, is provided competently.
- (10) You must take reasonable care to ensure that *taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client.
22. Therefore, under the Code of Professional Conduct, registered BAS agents must ensure that any BAS services they provide are provided competently, including any services declared to be a BAS service by the TPB including under the Legislative Instrument.

A service under the Superannuation Guarantee (Administration) Act 1992 to the extent that it relates to a payroll function or payments to contractors

23. The SGAA 1992 deals with, among other things, the liability of certain employers to make superannuation guarantee contributions for certain individuals they employ, including contractors who are treated as employees for superannuation purposes.
24. Payroll function is not a legislatively defined term. It refers to a function that is performed in connection with advising about the liability for:

- Pay As You Go Withholding (PAYG(W)); or
- superannuation guarantee contributions on salaries and wages.

25. Therefore, a payroll function can include:

- the calculation, verification and/or lodgment of payment summaries, employee termination payments, gross wages, allowances, PAYG(W) and other taxable and non-taxable payroll items; and
- the calculation, payment, verification and/or reporting of superannuation guarantee contributions.

26. A payment summary is defined in section 16-170 in Schedule 1 to the TAA 1953 to be a written statement that:

- names the payer and the recipient;
- if the recipient has given the recipient's tax file number (TFN) or Australian business number (ABN) to the payer - states the TFN or ABN;
- states the total of the withholding payments (if any) that it covers, and the total of the amounts withheld by the payer from those withholding payments;
- specifies the financial year in which the withholding payments were made;
- specifies the reportable fringe benefits amount (if any) that it covers in the income year to which that amount relates;
- specifies the reportable employer superannuation contributions (if any) that it covers and the income year to which those contributions relate; and
- is in the approved form.

27. Payments of superannuation guarantee for contractors refers to the calculation, verification and reporting of superannuation contribution payments made for contractors under a contract that is wholly or principally for labour.

28. Examples of services that go beyond a payroll function or payments of compulsory superannuation for contractors (and therefore are not by the Legislative Instrument included in BAS services) include:

- advising about the claiming of an allowable tax deduction for superannuation contribution purposes;
- advising about the application of fringe benefits tax laws (collection and recovery of tax provisions in Part VII to the *Fringe Benefits Tax Assessment Act 1986*);
- advising about, preparing and/or lodging income tax returns;
- advising on salary sacrifice arrangements/salary packaging;
- advising about the superannuation contribution caps and the effect of exceeding those caps.

29. If a BAS agent wishes to provide services that go beyond relating to a payroll function or payments for contractors, including those listed in paragraph 28 above, they may need to be a registered tax agent or a registered tax (financial) adviser, in relevant circumstances.

A service under the Superannuation Guarantee Charge Act 1992

30. The SGCA 1992 deals with the imposition of a charge on any superannuation guarantee (SG) shortfall of an employer for a quarter.
31. To determine if there is an SG shortfall, an employer needs to calculate the level of superannuation support provided for each employee in a quarter and compare this with the prescribed level of support to be provided (i.e. the charge percentage).
32. An employer that has an SG shortfall in a quarter is required to lodge an SG statement with the Australian Taxation Office (ATO) by the 28th day of the second month following the end of the quarter.
33. Therefore, the Legislative Instrument allows BAS agents to lawfully determine and report the SG shortfall amount and any associated administration fees.

A service under Part 3B of the Superannuation Industry (Supervision) Act 1993

34. Part 3B of the SISA provides a system of standards relating to payments and information connected with the operation of eligible superannuation entities. Part 3B allows for the Commissioner of Taxation, by legislative instrument, to determine standards (**superannuation data and payment standards**) relating to superannuation data and payment matters, applicable to trustees of, and employers in their dealings with, eligible superannuation entities.
35. Under the Superannuation Data and Payment Standards 2012 (F2013L00041 or as in force from time to time), the Commissioner of Taxation has specified, by way of legislative instrument, minimum requirements for dealing with payments and information relating to certain transactions within the superannuation system (including employer contributions, rollovers and transfers between superannuation entities and associated reporting obligations for superannuation purposes).
36. The Legislative Instrument ensures that a service provided by a BAS agent with regard to superannuation data and payments matters made in accordance with the Superannuation Data and Payment Standards 2012 will be a BAS service. BAS agents will therefore be able to lawfully deal with superannuation payments made through a clearing house.

A service under Part 5-30 in Schedule 1 to the Taxation Administration Act 1953

Part 5-30 in Schedule 1 to the TAA 1953 imposes additional reporting requirements on purchasers and suppliers to report certain information to the ATO on an annual basis. The information that needs to be reported relates to:

- the verification of ABNs;
- total payments paid (including goods and services tax (GST));
- GST amount paid; and
- total tax withheld where an ABN has not been quoted.

37. In particular, Division 405 in Schedule 1 to the TAA 1953, together with the accompanying regulations, requires businesses to report the payments they make to applicable contractors each year to the ATO through a Taxable payments annual report. To date, the accompanying regulations require that an annual report relating to payments made to applicable contractors in the building and construction industry is required to be reported.

38. Therefore, the Legislative Instrument allows BAS agents to lawfully complete and lodge the Taxable payments annual report to the ATO, on behalf of a client.

A service under sections 202CD and 202CF of the Income Tax Assessment Act 1936

39. Section 202CD of the ITAA 1936 details the requirements relating to sending a tax file number (TFN) declaration to the Commissioner of Taxation (Commissioner). The section outlines what the payer must do when a recipient gives them a TFN declaration. The section also deals with requirements to retain a copy of the TFN declaration.

40. Section 202CF of the ITAA 1936 details the requirements relating to sending a TFN declaration to the Commissioner where the recipient has not provided their TFN.

41. Therefore, the Legislative Instrument allows BAS agents to lawfully send a TFN declaration to the Commissioner, on behalf of a client.

A service under section 9 of the A New Tax System (Australian Business Number) Act 1999

42. Section 9 of the ABN Act 1999 details how an entity seeking an ABN must apply to the Registrar, in the approved form, to be registered on the Australian Business Register. The Legislative Instrument allows BAS agents to lawfully apply to the Registrar for an ABN, on behalf of a client.

Consultation

43. Consultation was carried out as follows:

- a. Comment was invited at the TPB's various Consultative Forums in 2011, 2012 and 2013
- b. Comment was invited at the ATO's BAS agent advisory group in 2011, 2012 and 2013.
- c. Comment was invited by Treasury in February 2013 on the draft legislation that proposed the law change to allow the Board to declare certain services to be a BAS service.
- d. Release of a discussion paper to members of the TPB's Consultative Forum in September 2015, with a 4 week comment period.

- e. Comment was invited at the TPB's Consultative Forum in November 2015, with consensus from all attendees of the services that the TPB were seeking to declare as BAS services.

44. The current membership of the TPB's Consultative Forum has remained relatively stable since it commenced in 2010. As at 30 June 2015, forum membership includes representatives from the following:

- Association of Accounting Technicians (Australia) Limited
- Association of Chartered Certified Accountants Australia and New-Zealand
- Australian Bookkeepers Association Ltd
- Australian Institute of Quantity Surveyors
- Chartered Accountants Australia and New Zealand
- CPA Australia
- Financial Planning Association of Australia
- Institute of Certified Bookkeepers
- Institute of Chartered Accountants in England and Wales
- Institute of Public Accountants
- Law Council of Australia
- Law Society of New South Wales
- National Tax Agents' Association Ltd (NTAA+)
- New Zealand Institute of Chartered Accountants
- Royal Institute of Chartered Surveyors Australasia
- SMSF Association
- TAI Practitioners & Advisers Limited
- The Tax Institute

Statement of Compatibility with Human Rights

This Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Tax Agent Services (Specified BAS Services) Instrument 2016

The Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The Legislative Instrument declares certain services as BAS services, for the purposes of the definition of BAS services as contained in section 90-10 of the TASA 2009. Such services relate to:

- (a) a service under the *Superannuation Guarantee (Administration) Act 1992* to the extent that the service relates to a payroll function or payments to contractors;
- (b) a service under the *Superannuation Guarantee Charge Act 1992*;
- (c) a service under Part 3B of the *Superannuation Industry (Supervision) Act 1993*;
- (d) a service under Part 5-30 in Schedule 1 to the *Taxation Administration Act 1953*;
- (e) a service under sections 202CD and 202CF of the *Income Tax Assessment Act 1936*; or
- (f) a service under section 9 of the *A New Tax System (Australian Business Number) Act 1999*.

On an assessment of the compatibility of this instrument with the seven core international human rights treaties to which Australia is a party, it has been determined that this instrument does not engage any of the applicable rights or freedoms because the instrument is minor or machinery in nature.

Conclusion

The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.