



**Submission by the  
Commonwealth Ombudsman**

**INQUIRY INTO THE TAX AGENT  
SERVICES BILL 2008**

Submission by the Commonwealth Ombudsman, Prof. John McMillan

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## **Introduction**

Following a 1993 inquiry of the Joint Committee of Public Accounts and Audit (JCPAA), the Taxation Ombudsman was established in 1995 as a key mechanism to correct perceived imbalances between the powers of the Australian Taxation Office (ATO) and taxpayers. The function of Taxation Ombudsman was conferred on the Commonwealth Ombudsman.

The Taxation Ombudsman focuses on handling and investigating complaints from taxpayers and tax professionals with respect to administrative actions of the ATO. This can include complaints about tax practitioners and their regulation by the various state-based Tax Agents' Boards (TABs). We also initiate own motion investigations on broader questions of administration and issue public reports and formal recommendations aimed at improving administration.

Since 1995, my office has received approximately 27,000 tax complaints. We generally receive between 1200 to 2000 tax complaints annually. In the past two years we have received approximately 30 complaints about tax agents or the state-based Tax Agents' Boards.

As Commonwealth and Taxation Ombudsman, I welcome the opportunity to comment upon the Bill.

Overall, the measures proposed appear to be fair, reasonable and comprehensive. If effectively implemented the reforms are likely to provide for a more centralised and structured approach to the regulation of tax practitioners, and should facilitate increased professional accountability and service delivery standards to the benefit of taxpayers, tax professionals and tax administration generally.

## **Complaints relating to tax practitioners and their regulation**

We receive a relatively small number of complaints annually relating to tax agents and practitioners. In 2008, we received 16 complaints relating to tax agent professional regulatory issues out of a total of around 1100 tax complaints. The complaints we receive are generally about three issues:

- a. Delay by a Tax Agents' Board in processing an agent's registration.
- b. Dissatisfaction with action taken by a Tax Agents' Board in relation to a complaint about the actions of a tax agent.
- c. The conduct of a tax agent.

In the 13 years that the Commonwealth Ombudsman has discharged the Taxation Ombudsman function, we have developed a productive working relationship with the various Tax Agents' Boards. The experience of my office in dealing with complaints relating to tax practitioners forms the basis of my observations and comments.

## **Benefits of the new provisions**

This office commends the aims of the new regulatory system to reform the registration and regulation of tax practitioners. The key elements, listed below, should facilitate this:

- The establishment of a national Tax Practitioners Board (the Board) to replace the existing state-based Boards
- A wider definition of 'tax practitioner' to include tax agents and their nominees as well as Business Activity Statement (BAS) service providers
- A legislated Code of Professional Conduct (the Code) to govern the provision of tax agents and BAS service providers, under which the Board may issue written guidelines for the interpretation and application of the Code
- A wider and more flexible range of disciplinary sanctions available to the Board, including applying to the Federal Court for civil penalties for specified significant misconduct by tax practitioners, or for injunctions or orders about practitioner conduct
- 'safe harbour' protection for taxpayers from penalties for making false or misleading statements where a taxpayer demonstrates that they have taken reasonable care over their tax affairs by engaging a registered tax practitioner and by providing the practitioner with all relevant information. We note that these provisions will be administered by the Commissioner of Taxation not the Board.

### *National Tax Practitioners Board*

The current state-based arrangement allows different Tax Agents' Boards to adopt different administrative practices, potentially resulting in inconsistency at a national level. This can harbour a perception of inequality, inconsistency and arbitrariness within the taxpaying and professional communities. That perception can undermine community confidence in the tax system and its administration and regulation. On this basis, it is expected that the implementation of a national Board will provide for more consistent decision-making, more co-ordinated practices and more effective remedial action where necessary or appropriate.

Complainants to the Ombudsman often perceive the various state Tax Agents' Board as an extension of the ATO. The proposed review of the governance arrangements of the Board (three years after the commencement of the Bill) is important to ensure the independence of the Board has not been compromised by the administrative arrangements outlined in the explanatory memorandum.

The expanded functions such as monitoring and enforcing adherence to the Code together with the improved accountability and transparency outlined in the Bill — for example, reporting annually to Parliament and publishing details of de-registered agents — will also help ensure that services provided to taxpayers by tax agents and BAS service providers meet appropriate standards of professional and ethical conduct.

### *Registration*

The inclusion of BAS service providers and their nominees in the regularity scope of the Bill addresses a major short-fall in the current system. The preparation of BASs is an important aspect of the current taxation system and BAS service providers play a key role. In the last year, around 9% of the complaints we received about the lodgement and processing of tax forms were about BASs. The inclusion of BAS service providers in the new regulatory scheme ensures relevant regulation of their conduct and should facilitate improvements in their work standards.

As illustrated in *Case study 1*, the timeframe imposed on the Board for making a decision about a registration appears to go some way to addressing some of the complaints we receive from tax agents.

***Case study 1: delay in considering an application for registration***

Mr K complained to us about what he considered was an unacceptable delay by a state Tax Agents' Board (the Board). Mr K lodged his application for registration with the Board in September 2007 and he was advised that a decision would be made by the Board at its November meeting. By December 2007 his application was still not decided and he was advised by the Board that a decision would not be made until February 2008, a delay of six months.

When we investigated Mr K's complaint we found that due to an administrative error, Mr K's application was not considered at the Board's November or December meetings and, because the Board did not meet in January, he had to wait until the next meeting of the Board in February 2008. His application for registration as tax agent was approved in February 2008.

The Bill also allows for the Board to apply restrictions to registrations either as a result of misconduct or to address limitations on qualifications. This element of the Bill recognises the complex nature of the current taxation system.

*Code of Professional Conduct*

The Code is intended to promote ethical, principled and accountable behaviour within the profession, an outcome which is clearly consistent with good tax administration.

The Code is an important advance in tax practitioner accountability and compliance. I have previously commented on the complexity of current Australian tax law, acknowledging that such complexity may be a necessary development in a world characterised by complex financial transactions. It is becoming increasingly apparent that many taxpayers feel unable to navigate tax law, policy and procedure with any degree of confidence without a tax professional to assist them.

In this environment some regulation of tax professionals is appropriate to ensure taxpayer protection and professional competence. The Code's requirements seem reasonable and proportionate. If effective, the Code should lead to a reduction in complaints about tax practitioners.

*Administrative sanctions, civil penalties and injunctions*

The range of graduated administrative sanctions available to the Board for breaches of the Code provides the board with flexibility to choose a sanction proportionate to the breach. This element of the new Bill addresses a primary concern of the complaints we receive about tax agents and the various Tax Agents' Boards. As illustrated in *Case study 2*, taxpayers often allege that the state-based Tax Agents' Boards impose inadequate discipline on tax agents. We regularly explain to taxpayer complainants the limitations which exist in the current system in relation to disciplining tax agents.

The administrative sanctions and civil penalties contained in the Bill provide the additional rigour and accountability required to improve taxpayer protection and ensure professional competence as well as improving the integrity of the tax system.

### ***Case study 2: dissatisfaction with Tax Agents' Board***

Ms X complained to us about what she considered was inadequate action by a state Tax Agents' Board (the Board) when she complained to them about the conduct of her tax agent. Ms X said that her tax agent had provided her with incorrect advice and had taken too long to establish a company for her business dealings and Ms X considered that the Board had taken inadequate action.

When we investigated Ms X's complaint we found that the Board had investigated aspects of Ms X's complaint but to fully investigate the matter would have required more resources than they thought the situation warranted, given the sanctions available to them. The Board advised us that although they considered the advice provided by her tax agent in this matter was not satisfactory, they were reluctant to take disciplinary action for an apparently isolated event.

We advised Ms X that the new tax agents' regulatory scheme may provide a remedy for the seeming lack of accountability in the current system.

The Bill allows some decisions of the Board to be reviewed by the Administrative Appeals Tribunal. Importantly, the regime involves some important checks and balances such as procedural requirements for the giving of notices in writing, and in the form of access to merit review rights. The wider range of sanctions, penalties and injunctions together with the removal of criminal sanctions in the current system appear to provide for flexible and targeted remedial action, with recourse to appropriate merits and judicial review options.

#### *Safe harbour from penalties*

The safe harbour provision to be administered by the ATO appears to be an appropriate and measured step that seeks to provide more balance between the obligations and burdens that fall on taxpayers under the current self-assessment regime and the penalties that may be imposed for non-compliance with tax laws. They should provide greater certainty and protection for taxpayers who take reasonable care in the handling of their tax affairs, ensuring that they will not be subject to penalties as a result of the actions of tax professionals.

### **Conclusions**

Tax professionals play a crucial role in the operation of Australia's tax system. The manner in which they provide their services has a significant impact on both the overall integrity of the tax system and community confidence in the system. The range of improvements to the regulation of tax professionals contained in the Tax Agents Services Bill 2008 should facilitate greater accountability and transparency, more consistent decision-making and the maintenance of appropriate standards of professional and ethical conduct. These improvements should lead to both an increase in the integrity of the tax system and in community confidence in tax professionals.