# EXPLANATORY STATEMENT

## Select Legislative Instrument 2010 No. 273

**Issued by authority of the Assistant Treasurer**

*Tax Agent Services Act 2009*

*Tax Agent Services Amendment Regulations 2010 (No. 1)*

Section 70-55 of the *Tax Agent Services Act 2009* (the Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 20-10 of the Act provides that regulations may prescribe systems to accredit professional associations to recognise professional qualifications and experience relevant to the registration of individuals as tax agents and Business Activity Statement (BAS) agents.

Section 90-5 of the Act provides that regulations may specify services that are not tax agent services.

These Regulations prescribe services that are not tax agent services and are outside the tax agent services regime permanently or for defined periods. The Regulations improve and clarify the drafting of the *Tax Agent Services Regulations 2009* (the Principal Regulations) in relation to the system of recognition of professional associations.

The Regulations clarify the rules and definitions in relation to the recognition of tax agent and BAS agent associations by redrafting the substance of the Principal Regulations and improving their structure.

The Regulations also:

- require tax agent and BAS agent associations to notify the Tax Practitioners Board (the Board) of any change of circumstances that would impact on the organisation's ongoing recognition by the Board;

- defer the application of the tax agent services regime to holders of Australian Financial Services Licenses (registered financial planners); and

- exclude certain services that are effectively internal, between connected entities or provided between closely related parties, from the tax agent services regime.

Further details of the Regulations are set out in the Attachment.

The details of the Regulations were developed through a consultation process commencing in 2010. Public consultation took place on an exposure draft from 9 July to 26 July 2010. Due to the prorogation of Parliament submissions were

received up to September 2010. Key stakeholders were also consulted throughout the development.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Authority: Section 70-55 of the *Tax Agent Services Act 2009*

# ATTACHMENT

**Details of the *Tax Agent Services Amendment Regulations 2010 (No. 1)***

Regulation 1 — Name of Regulations

This regulation provides that the title of the Regulations is the *Tax Agent Services Amendment Regulations 2010 (No. 1).*

Regulation 2 — Commencement

This regulation 2 provides that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 — Amendment of *Tax Agent Services Regulations 2009*

This regulation 3 provides that the Regulations amend the existing *Tax Agent Services Regulations 2009* (the Principal Regulations) which were made on 12 November 2009 and registered the following day.

**SCHEDULE 1 - AMENDMENTS**

**Item [1] to [3] - Regulations 3 to 6 - amendments to clarify the recognition of tax agent and BAS agent associations**

These amendments improve the clarity of the rules and definitions in relation to the recognition of tax agent and BAS agent associations. The amendments effectively re-write the substance of the regulations as enacted on 12 November 2009 and improve their structure and application.

As part of the re-write, an additional requirement is included. That is, a recognised tax agent or BAS agent association is required to notify the Tax Practitioners Board (the Board) of any change of circumstances that impacts on their ongoing recognition by the Board. The notification must be in writing, be accompanied by a statement as to why the Board should not terminate the association's recognition and must be made within 30 days from the day that the organisation became aware, or ought to have become aware, that the requirement ceased to exist.

These amendments also note that words and expressions used in the Principal Regulations have the same meaning as they have in the *Income Tax Assessment Act 1997* (ITAA 1997).

**Item [4] - Regulation 13 – services that are not considered to be tax agent services**

Under these amendments, regulation 6 has been moved and is now regulation 13. This is a technical amendment to ensure that the sequence of the Principal Regulations reflects the order of the Act.

A tax agent service is defined in section 90-5 of the *Tax Agent Services Act 2009* (the Act). Subsection 90-5(2) allows services to be excluded from this definition through regulations. These amendments expand the services that are considered not to be a tax agent service and are therefore not subject to regulation under the Act. In most circumstances, this is intended to provide long-term certainty to particular sectors where the application of the tax agent services regime would be inappropriate. In the case of financial planners, it provides short-term certainty while consideration is given to whether the application of the tax agent services regime in broadly its current form, is appropriate for them, or whether some other regulatory approach is more suitable.

Notably, because a BAS service is a subset of a tax agent service, a service that is excluded from the definition of tax agent service also ceases to be a BAS service.

*Services provided between related entities*

Under these amendments, the following services are not a tax agent service:

- a service provided by an entity (or a related entity of the entity) to a related entity; and

- a service provided by a related entity of an entity (the first entity) to another related entity of the first entity.

This recognises that it is not appropriate for the registration requirements to be applied where services are, effectively, internal and provided between closely related parties with common ownership elements. For instance, the tax functions for a corporate group will often be allocated to a team within one entity of that corporate group. They will be responsible for managing the tax obligations for the entire group. While a 'fee' may be paid for these services, it acts as a means of allocating costs amongst the group (in contrast to a payment for an arm's length transaction).

A 'related entity' is defined by these amendments, and includes an associated entity, as defined in section 50AAA of the *Corporations Act 2001* (Corporations Act). This term encompasses concepts of related bodies' corporate (defined in section 50 of the Corporations Act) and entities controlling other entities (the test for control is outlined in section 50AA of the Corporations Act).

The use of the term associated entity ensures that services provided both within wholly owned groups (such as groups that are consolidated for income tax purposes) and other groups of related bodies fall outside the scope of the tax agent services regime. There is no requirement for these groups to be listed.

A 'related entity' also includes an entity under common ownership. Section 995-1 of the ITAA 1997 indicates that two companies are under 'common ownership' where, amongst other things, the ultimate owners of the companies (that is, traced through any interposing companies and trusts) are the same individuals whose ownership rights are held in the same proportion. For the purpose of the Regulations, the definition of 'under common ownership' should be applied as if a reference to a company is a reference to an entity.

A ‘related entity’ extends to a stapled entity or an associated entity of that stapled entity. Section 124-1045 of the ITAA 1997 provides that an entity is a stapled entity in relation to stapled securities if ownership interests in the entity form part of the stapled securities. Ordinarily, the stapled entities would be a company and a unit trust, with a share in the company and a unit in the unit trust constituting the stapled security. These entities are clearly operating a common economic enterprise and tax agent services provided between these entities and their related entities can also be regarded as an internal matter. The definition extends to associated entities of a stapled entity to recognise that the two stapled entities are often part of a much larger stapled group and subsidiary companies or trusts may provide tax agent services to each other.

Finally, a related entity includes entities connected through the right to control the exercise of at least 50 per cent of the voting power in another entity. Section 328-125 of the ITAA 1997 is the source of this test, and the relevant level of control for the purpose of the Regulations is 50 per cent. These entities will likely be operating as a larger group and therefore services provided between the entities can also be regarded as ‘internal services’.

*Services provided by the trustee of a trust to the trust or an entity controlled or owned by the trust*

Under Australia’s taxation laws, trustees must lodge an annual return for the trust and otherwise manage the tax affairs of the trust. While many trusts are family trusts and it is unlikely that any fee would be payable to the trustee (usually a member of the family) to undertake these duties, trust structures can be and are used as larger investment vehicles where the trustee, often a corporate trustee, is paid a management fee for its services. Part of this fee could be attributable to the tax agent services performed by the trustee in ensuring that the trust meets its tax obligations.

Under these amendments a trustee (or a related entity of the trustee), in discharging its obligations in managing the trust’s tax affairs, does not need to be registered as a tax agent. In some instances where the trustee is part of a broader group of entities, the tax agent services provided to the trust may be provided by a related entity of the trustee. The trustee or its related entity may also provide services to entities that are wholly owned or controlled by the trust. These amendments ensure that services provided in those circumstances are not tax agent services.

*Services provided by the responsible entity of a managed investment scheme*

A managed investment scheme provides a vehicle by which funds are pooled for investment. These can take the form of cash managed trusts, property trusts and many agricultural schemes. Certain managed investment schemes are required to be registered under the Corporations Act and are operated by a responsible entity. Unregistered schemes are operated by entities that effectively take on the role of a responsible entity, a role that combines the duties of a manager and trustee of the scheme.

As with the trustee of a trust, the responsible entity may manage the tax affairs of the scheme. This includes completing and lodging annual tax returns and BAS returns and otherwise ensuring that the scheme complies with its tax obligations. Again,

these amendments ensure that in fulfilling its obligations in relation to the scheme, a responsible entity need not be a registered tax agent (or BAS agent).

In some instances where the responsible entity is part of a broader group of entities, the tax services provided to the scheme may be provided by a related entity of the responsible entity. These amendments also ensure that services provided in those circumstances are not tax agent services.

*Services provided between partners in a partnership*

The income tax law regards persons that carry on business in common with a view to profit or who are in receipt of ordinary income or statutory income jointly to be partners in a partnership (defined in section 995-1 of the ITAA 1997). In most instances, one party in the partnership is often best placed to manage the tax affairs of the partnership (which may include lodging an annual partnership return). These amendments make it clear that in performing these functions a partner (or a related entity of the partner) is not required to register. However, if a partner provided taxation advice to another partner in matters unrelated to the partnership and charged a fee for doing so, the tax agent services regime applies and the entity is required to register.

*Services provided by a member in a joint venture*

While a partnership covers most instances where entities have agreed to undertake a common economic enterprise, it does not cover all such instances. For instance, two parties may decide to undertake a common economic enterprise through a separate entity, such as a company or unit trust, or in circumstances where the output or profit of a joint venture is shared. This arrangement is outside of a formal 'partnership' arrangement under the taxation law. In these situations, it may be agreed that one of the parties to the joint venture undertakes the necessary tax compliance work for the joint venture entity. These amendments ensure that such services do not constitute tax agent services.

*Services provided by licensed custodians or depository services*

The primary role of asset custodians is to provide for the safekeeping and administration of assets on behalf of clients. As a part of this, custodians or depository services will act on client instructions, settle transactions authorised by clients and collect and distribute income from the assets that they administer.

As a closely connected and integral part of undertaking these activities, custodians may provide a number of tax-related services. For example, master custodians (who provide services to Australian corporate and government institutions), may provide:

- reports to clients containing information for incorporation into their client's tax return;

- advice to unit holders of a trust regarding the taxation components of distributions; and

- BAS preparation services (in relation to the asset being administered) for review by clients.

Sub-custodians (who generally provide services to non-resident institutions) may also be involved in tax related activities, for instance withholding amounts from certain payments to clients under the Pay-As-You-Go (withholding) system and seeking refunds of overpaid amounts.

While not all of these services constitute a tax agent service within the meaning of the Act (this must be determined on the basis of a consideration of the facts in each case), these amendments remove any uncertainty. In particular, these amendments ensure that custodial and depository services, when provided by an entity licensed to provide those services under the Corporations Act (or their authorised representative), are not tax agent services.

The definition of a custodial or depository service, as defined section 766E of the *Financial Services Reform Act 2001*, makes it clear that such a service is not intended to constitute only the passive holding of assets. Indeed, the Explanatory Memorandum to that Bill (at paragraph 6.104) makes it clear that a custodial or depository service includes:

- paying tax or other costs associated with the assets; and

- performing any other function necessary or incidental to the safeguarding or administration of the assets (including record keeping and reporting functions).

*Post-sale services*

The divestment of an entity may include a requirement for the seller to provide transitional services to the buyer, including fulfilling obligations under a tax law. These amendments ensure that services provided by a seller in relation to the income year of the divestment are not tax agent services and registration as a tax agent is not required. The services need not be carried out in the income year of the sale, but must relate to the income year in which the sale occurred.

*Deferral of the application of the tax agent services regime to financial planners in certain circumstances*

Financial planners assist clients to develop and implement a financial strategy to meet their long-term financial objectives. In doing so, they provide financial product advice and must accordingly hold an Australian Financial Services (AFS) license under the Corporations Act.

In the course of providing financial product advice, financial planners are required to consider the client's tax situation as well as the tax consequences of financial products. The tax services provided by financial planners may include, for example, providing advice on:

- the taxation benefits of salary sacrificing into superannuation in the context of a broader strategy to increase retirement savings;

- the relative merits of taking out life insurance policies both within and outside superannuation; and

- small business capital gains tax concessions as a means of maximising contributions into superannuation.

To provide immediate certainty to the financial planning industry and to enable broader consultation with the tax community, these amendments provide an exemption (ceasing on 30 June 2011) from the tax agent services regime for services provided by financial planners in certain circumstances.

Under the amendments, any service that constitutes financial product advice (see section 761A and 766A of the Corporations Act) is not considered to be a tax agent service if:

- if it is provided by an entity licensed to provide that service under the Corporations Act (that is, it is provided by an entity with an AFS license); and

- it is accompanied by a written and prominent statement indicating that the recipient of those services should consider taking advice from a registered tax agent before relying on advice that may impact on their tax obligations, liabilities or entitlements.

The exemption does not include a service that does not constitute financial product advice (for instance, the completion of a tax return or representing a client in their dealings with the Australian Taxation Office).

The requirement that the written statement be prominent is intended to safeguard against entities seeking to comply with their obligations by including a disclaimer in a form (location or size) where it is not reasonable to expect a client to read the statement.

**Item [5] to [9] – minor technical corrections**

Items 5 to 8 make minor technical corrections to Schedule 1 to the Principal Regulations which sets out the criteria that an organisation must satisfy to become a recognised tax agent association. As the Explanatory Statement to the *Tax Agent Services Regulations 2009* notes, item 208 of that Part was intended to enable organisations to be able to be recognised, notwithstanding that they may not strictly meet similar criteria provided for in the Part.

Item 9 makes a minor technical correction to Schedule 2 to the Principal Regulations.