



Australian Government

COMMONWEALTH OF AUSTRALIA

Tax Agent Services (Specified BAS Services No. 1)

Instrument 2020

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 *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*;
- (b) a service under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*;
- (c) a service under any rules that the Treasurer has made or may make, by legislative instrument, pursuant to section 20 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and
- (d) a service under any legislative instrument made under subsections (b) and (c).

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. The Legislative Instrument allows the services listed in paragraph 7, 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 already undertake work under Subdivisions 12-B, 12-C and 12-D in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) and the indirect tax laws. Consequently, the Instrument is effectively extending the service offering BAS agents already provide under the TASA 2009. Further, no regulatory compliance costs were identified by Government as part of the amendments to the TASA 2009 to allow the Tax Practitioners Board (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 *Income Tax Assessment Act 1997* (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); and
- (d) Division 389 in Schedule 1 to the *Taxation Administration Act 1953*; and
- (e) the *Major Bank Levy Act 2017*.

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 considered 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 *Tax Agent Services (Specified BAS Services) Instrument 2016* (F2016L00967 registered on 1 June 2016) was introduced to allow 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 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. a service under the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*;
 - b. a service under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*;
 - c. a service under any rules that the Treasurer has made or may make, by legislative instrument, pursuant to section 20 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and
 - d. a service under any legislative instrument made under subsections (b) and (c).
21. Importantly, 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 nor does it seek to override any conditions imposed on a BAS agent's registration. If a BAS agent does not have the requisite skills and expertise to provide the services listed under the Legislative Instrument, they should not be providing the services (even though they may legally be able to do so). 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.
 - (8) You must maintain knowledge and skills relevant to the BAS services that you provide.
 - (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 included under the Legislative Instrument.

Legislative Instrument in detail

Section 1: Name of Instrument

23. Section 1 provides that the name of the Legislative Instrument is the *Tax Agent Services (Specified BAS Services No. 1) Instrument 2020*.

Section 2: Commencement

24. Section 2 provides that the Legislative Instrument will commence on the day after it is registered in the Federal Register of Legislation.

Section 3: Authority

25. Section 3 sets out the legislative authority for making the Legislative Instrument: subsection 90-10(1A) of the TASA 2009.

Section 4: Definitions

26. Section 4 is the definitions section. This section includes a definition for **BAS service**.

Section 5: Specified services that are BAS services

27. Section 5 declares, for the purposes of the definition of a BAS service, certain services to be BAS service.

A service under the Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020

28. The *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* deals with payments to support employers and encourage retention of employees through any economic downturn caused by the spread of the Coronavirus.
29. In particular, under the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*, two sets of cash flow boosts will be delivered from 28 April 2020 to support employers to retain employees. The ATO will provide tax-free cash flow boosts of between \$20,000 and \$100,000 to eligible businesses, delivered through credits in the activity statement system, when eligible businesses lodge their activity statements.
30. Given that credits will be delivered through the activity statement system, it is important that BAS agents are legally in a position to provide the full range of services that relate to the assessment of cash flow boost payments to their clients.
31. Examples of services that may relate to the assessment of cash flow boost payments to eligible entities, include:

- (a) advising about an entity's entitlement to cash flow boost payments, including the amount of cash flow boost an entity is entitled to;
- (b) ascertaining and/or advising about an entity's liabilities and obligations under Subdivisions 12-B, 12-C and 12-D in Schedule 1 to the TAA 1953;
- (c) notifying the Commissioner of Taxation about an entity's liabilities and/or obligations under Subdivisions 12-B, 12-C and 12-D in Schedule 1 to the TAA 1953;
- (d) advising an entity to not enter into, or be part of, or carry out a scheme that has the sole purpose of making that entity entitled to the cash flow boost for a period, or increasing the amount of the cash flow boost to which the entity would be entitled to;
- (e) advising about the timing of payments of a cash flow boost an entity may be entitled to;
- (f) advising about an entity's liability to repay any overpayments of the cash flow boost and the timing of such repayments;
- (g) advising about an entity's liability to pay a general interest charge on outstanding overpayment debts; and
- (h) advising about seeking a review of a decision made by the Commissioner about an entity's entitlement to the cash flow boost.

A service under the Coronavirus Economic Response Package (Payments and Benefits) Act 2020

- 32. The *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* establishes a framework to administer the Coronavirus economic response payments and allows eligible businesses impacted by the Coronavirus to access financial support by way of one or more kinds of economic response payments by the Commissioner of Taxation.
- 33. Under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, eligible entities will be able to access assistance for the period from 1 March 2020 until 31 December 2020 (inclusive) to support eligible businesses to help retain employees and importantly, to enable eligible businesses to reactivate their operations when the crisis is over.
- 34. Examples of services that may relate to payments made by the Commissioner of Taxation to eligible businesses, include:
 - (a) advising about the method of payment to an entity of any economic response payment or payments;
 - (b) advising about an entity's liability to repay any overpayments of economic response payment or payments, and the timing of such repayments;
 - (c) advising about an entity's liability to pay a general interest charge on outstanding overpayment debts;
 - (d) advising about when an entity may be jointly and severally liable for repayment of any overpayments of an economic response payment or payments;

- (e) advising about an entity's record keeping requirements with respect to an economic response payment or payments;
- (f) advising about seeking a review of a decision made by the Commissioner of Taxation about an entity's entitlement to an economic response payment or payments; and
- (g) advising an entity to not enter into, or be part of, or carry out a scheme that has the sole or dominant purpose of making that entity entitled to an economic response payment, or increasing the amount of the economic response payment, to which the entity would be otherwise entitled.

A service under the rules that the Treasurer may, by legislative instrument, make

35. Pursuant to section 20 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, the Treasurer has made the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*. This Rule supports the framework as established by the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*. Under that framework, the Treasurer is able to make rules to provide for payments administered by the Commissioner. This allows for flexibility of the payment arrangements and ensures the robustness of the eligibility criteria to appropriately respond to the impacts of the Coronavirus.
36. Practically, the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* allow for eligible businesses impacted by the Coronavirus to access a subsidy, referred to as the jobkeeper payment, to cover the cost of wages of their employees.
37. Under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*, eligible entities will be able to access assistance for the period from 30 March 2020 until 27 September 2020 (inclusive). Under the scheme, eligible entities will be entitled to a payment of \$1,500 per fortnight for each eligible employee. Eligible entities may also be entitled to a payment of \$1,500 per fortnight for one eligible business participant who is actively engaged in operating the business.
38. Examples of services that may relate to payments made by the Commissioner of Taxation under the jobkeeper scheme, include:
 - (a) advising about an entity's entitlement to a jobkeeper payment for an eligible employee, including advising an entity about how the entity qualifies for the jobkeeper payment, who is an eligible employee and whether the entity satisfies the wage condition;
 - (b) advising about an entity's entitlement to a jobkeeper payment for an eligible business participant;
 - (c) notifying the Commissioner of Taxation in the approved form that the entity elects to participate in the jobkeeper scheme;
 - (d) advising about an entity's liabilities and obligations under the jobkeeper scheme, including an entity's obligations to the Commissioner of Taxation and an entity's obligations to the eligible employee;
 - (e) advising about the timing of jobkeeper payments; and

- (f) advising about an entity's reporting requirements in relation to the jobkeeper payments.

Consultation

39. Consultation was carried out as follows:

- a. Consultation with the ATO, who will be administering the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*, *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.
- b. Meeting with members of the TPB's Consultative Forum and Financial Adviser Forum on 9 April 2020 and subsequent out of session feedback provided.

40. There is no requirement for a Regulatory Impact Statement in this instance. This is in line with an announcement on 18 March 2020 that due to truly urgent and unforeseen events related to the spread of COVID-19, the Prime Minister has granted an exemption from the need to complete regulatory impact analysis in the form of Regulation Impact Statements for all Australian Government measures made in response to COVID-19. However, a post-implementation review will occur within two years of implementation for all measures subject to the Prime Minister's exemption.

41. As at 9 April 2020, forum membership, which covers tax agent, BAS agent and tax (financial) adviser professional associations, includes representatives from the following TPB recognised professional associations:

- (a) Association of Accounting Technicians (Australia) Limited
- (b) Association of Chartered Certified Accountants
- (c) Association of Financial Advisers
- (d) Australian Bookkeepers Association Ltd
- (e) Australian Institute of Quantity Surveyors
- (f) Chartered Accountants Australia and New Zealand
- (g) CPA Australia
- (h) Financial Planning Association of Australia
- (i) Financial Services Institute of Australasia
- (j) Institute of Certified Bookkeepers
- (k) Institute of Chartered Accountants in England and Wales
- (l) Institute of Public Accountants
- (m) Law Society of New South Wales
- (n) National Tax Agents' Association Ltd (NTAA+)

- (o) Royal Institute of Chartered Surveyors Australasia
- (p) SMSF Association
- (q) South African Institute of Chartered Accountants
- (r) Stockbrokers and Financial Advisers Association Limited
- (s) TAI Practitioners & Advisers Limited
- (t) 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 No. 1) Instrument 2020

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 *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*;
- (b) a service under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*;
- (c) a service under any rules that the Treasurer has made or may make, by legislative instrument, pursuant to section 20 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and
- (d) a service under any legislative instrument made under subsections(b) and (c).

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.