



Australian Government

COMMONWEALTH OF AUSTRALIA

Tax Agent Services (Specified BAS Services No. 2) 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 *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 *Tax 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*.

8. Service is defined in section 4 of the Legislative Instrument to mean a service:
 - (a) that relates to:
 - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under section 5; or
 - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under section 5; or
 - (iii) representing an entity in their dealings with the **Commissioner** under section 5;
 - (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 section 5;
 - (ii) to claim entitlements that arise, or could arise, under section 5.

What is the effect of this instrument?

9. 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.

10. 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

11. 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 Tax Practitioners Board (TPB) to declare certain services as BAS services.

Background

12. 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*.

13. BAS provision is defined by reference to section 995-1 of the *Income Tax Assessment Act 1997* (ITAA) 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 2017*.

Note: BAS stands for Business Activity Statement.

14. 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.
15. 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.
16. 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.
17. 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.
18. In early 2019, the TPB identified that the *Tax Agent Services (Specified BAS Services) Instrument 2016* did not adequately define the scope of services provided by BAS agents in relation to the superannuation guarantee and the superannuation guarantee charge. In particular, the TPB identified that representing a client in their dealings with the Commissioner of Taxation was limited to services insofar as they related to a payroll function or payments to contractors, and therefore, did not extend to representing a client in their dealings with the Commissioner of Taxation in relation to the superannuation guarantee charge.
19. To address this, the *Tax Agent Services (Specified BAS Services No. 2) Instrument 2020* repeals the *Tax Agent Services (Specified BAS Services) Instrument 2016*. It 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

20. 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.
21. 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).

22. 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.
23. Once the Legislative Instrument has commenced, a registered BAS agent will be able to lawfully provide the following, noting the definition of service in section 4 of the Legislative Instrument:
- (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 *Tax 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*.
24. 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.
25. 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.
26. The TPB has the power, under subsection 33(3) of the *Acts Interpretation Act 1901*, to repeal, rescind, revoke, amend, or vary the Legislative Instrument should any significant compliance concerns be identified.

Legislative Instrument in detail

Section 1: Name of Instrument

27. Section 1 provides that the name of the Legislative Instrument is the *Tax Agent Services (Specified BAS Services No. 2) Instrument 2020*.

Section 2: Commencement

28. 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

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

Section 4: Definitions

30. Section 4 is the definitions section. This section includes definitions for **BAS service**, **Commissioner** and **service**.

Section 5: Specified services that are BAS services

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

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

32. 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.

33. The SGAA 1992 also deals with the assessment and payment of the superannuation guarantee charge, payable in circumstances where an employer has a superannuation guarantee shortfall.

34. Examples of services that may relate to the assessment and payment of the superannuation guarantee charge (and therefore are included by Legislative Instrument in the definition of BAS services) include:

- (a) advising about a superannuation guarantee charge liability, including the calculation of the superannuation guarantee charge and preparing the superannuation guarantee charge statement;

- (b) advising about the offsetting of late payments of superannuation contributions against the superannuation guarantee charge, including completing the late payment offset election section of the superannuation guarantee charge statement;
 - (c) representing a client in their dealings with the Commissioner of Taxation relating to the superannuation guarantee charge, including the lodgment of superannuation guarantee charge statements, being an authorised contact in relation to the superannuation guarantee and superannuation guarantee charge accounts, and accessing the superannuation guarantee and superannuation guarantee charge accounts in online services for BAS agents;
 - (d) being an authorised contact for payment arrangements relating to the superannuation guarantee charge account;
 - (e) being an authorised contact for requesting penalty remissions relating to the superannuation guarantee charge; and
 - (f) being an authorised contact for any audit or review activity undertaken by the Commissioner of Taxation relating to the superannuation guarantee charge.
35. Payroll function is not a legislatively defined term. It refers to a function that is performed in connection with advising about the liability for:
- (a) Pay As You Go Withholding (PAYG(W)); or
 - (b) superannuation guarantee contributions on ordinary time earnings.
36. Therefore, a payroll function can include:
- (a) 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
 - (b) the calculation, payment, verification and/or reporting of superannuation guarantee contributions on ordinary time earnings.
37. A payment summary is defined in section 16-170 in Schedule 1 to the TAA 1953 to be a written statement that:
- (a) names the payer and the recipient;
 - (b) 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;
 - (c) 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;
 - (d) specifies the financial year in which the withholding payments were made;
 - (e) specifies the reportable fringe benefits amount (if any) that it covers in the income year to which that amount relates;
 - (f) specifies the reportable employer superannuation contributions (if any) that it covers and the income year to which those contributions relate; and

(g) is in the approved form.

38. 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.
39. Examples of services that go beyond a payroll function or payments of compulsory superannuation for contractors (and therefore are not by Legislative Instrument included in the definition of BAS services) include:
 - (a) advising about the claiming of an allowable tax deduction for superannuation contribution purposes;
 - (b) 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*);
 - (c) advising about, preparing and/or lodging income tax returns;
 - (d) advising on salary sacrifice arrangements/salary packaging;
 - (e) advising about the superannuation contribution caps and the effect of exceeding those caps.
40. 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 39 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 (SGCA 1992)

41. The SGCA 1992 deals with the imposition of a charge on any superannuation guarantee (SG) shortfall of an employer for a quarter.
42. 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).
43. 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.
44. 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 (SISA 1993)

45. Part 3B of the SISA 1993 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.
46. 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).
47. 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

48. 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:
 - (a) the verification of ABNs;
 - (b) total payments paid (including goods and services tax (GST));
 - (c) GST amount paid; and
 - (d) total tax withheld where an ABN has not been quoted.
49. 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.
50. 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 (ITAA 1936)

51. Section 202CD of the ITAA 1936 details the requirements relating to sending a tax file number (TFN) declaration to the Commissioner of Taxation. 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.
52. 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.
53. 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 (ABN Act 1999)

54. 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

55. Consultation was carried out as follows:
 - (a) Comment was invited at the TPB's various Consultative Forums in 2016, 2017, 2018 and 2019.
 - (b) Release of a discussion paper to the Australian Taxation Office (ATO) in October 2019 seeking feedback on the TPB's proposal to further expand BAS services to include additional services relating to the superannuation guarantee charge. The ATO expressed their support for the TPB's proposal.
 - (c) Consultation in January 2020 with the TPB's Consultative Forum members by way of the release of a discussion paper outlining the proposed expansion of the scope of services that BAS agents may provide relating to the superannuation guarantee charge. The discussion paper was released for a six-week comment period. Of the feedback received, only one member expressed concern about the expansion of BAS services, noting that BAS agents may not have the requisite skills and knowledge to undertake the services proposed. The TPB emphasises in this Explanatory Statement that BAS agents are bound by the Code of Professional Conduct and must not provide the services if they do not have the requisite skills, knowledge and competency.

- (d) Further consultation at the TPB's Consultative Forum in May 2020, with members expressing support for the services declared as a BAS service under the Legislative Instrument.
- (e) The draft Legislative Instrument and Explanatory Statement were released to the TPB's Consultative Forum members in May 2020, with a one-week comment period. No feedback was received.
- (f) The draft Legislative Instrument and Explanatory Statement were released for a 28-day public consultation period from 15 June 2020 to 13 July 2020. Of the feedback received, two of the TPB's Consultative Forum members expressed concerns that BAS agents may not have the requisite skills and knowledge to undertake the services proposed and that the education and qualification requirements for registration as a BAS agent are not commensurate to the range of services that BAS agents will be permitted to provide under Legislative Instrument. The TPB emphasises in this Explanatory Statement that BAS agents are bound by the Code of Professional Conduct and must not provide the services if they do not have the requisite skills, knowledge and competency.

56. The current membership of the TPB's Consultative Forum has remained relatively stable since it commenced in 2010. As at 5 August 2020, forum membership includes representatives from the following:

- (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) 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 *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 *Tax 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*.

Service is defined in section 4 of the Legislative Instrument to mean a service:

- (a) that relates to:
 - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under section 5; or
 - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under section 5; or
 - (iii) representing an entity in their dealings with the **Commissioner** under section 5;
- (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 section 5;
 - (ii) to claim entitlements that arise, or could arise, under section 5.

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 Legislative Instrument does not engage any of the applicable rights or freedoms because the Legislative Instrument is minor or machinery in nature.

Human rights implications

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms as it simply extends the scope of services that registered BAS agents can provide by expanding the definition of a BAS service.

Conclusion

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