



TPB Information Sheet

TPB(I) 13/2012

Contractors

Disclaimer

This is a Tax Practitioners Board (TPB) Information Sheet (TPB(I)). It is intended to be for information only. While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers provided in the TASA.

In addition, please note that the principles, explanations and examples in this TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law. Please refer to the TASA for the precise content of the legislative requirements.

Document history

The TPB released this document as a final information sheet on 26 June 2012.

On 14 October 2015, the TPB updated this TPB(I) to incorporate tax (financial) advisers.

On 27 September 2016 the TPB updated this TPB(I) to incorporate a reference to the *Tax Agent Services (Specified BAS Services) Instrument 2016*.

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Introduction

1. This Information Sheet (TPB(I)) has been prepared by the Tax Practitioners Board (TPB) to help contractors to understand the operation of the tax agent services regime, including registration requirements for contractors and employees.
2. In this TPB(I), you will find the following information:
 - background about the tax agent services regime (paragraphs 3 to 15)
 - examples of circumstances where a contractor does not need to register as a tax agent or BAS agent (paragraph 16)
 - examples of circumstances where a contractor may need to register as a tax agent or BAS agent (paragraphs 17 to 18)
 - options available to contractors (paragraphs 19 to 20)
 - observations about using employees instead of contractors (paragraphs 21 to 22).

Background

3. The TPB administers a system for the registration of tax agents, BAS agents and tax (financial) advisers (known collectively as 'tax practitioners') under the *Tax Agent Services Act 2009* (TASA). This TPB(I) will focus on contractors in the context of registration as a tax agent or BAS agent, although the TPB recognises that contractors may also register as a tax (financial) adviser. For further information on tax (financial) advisers, refer to the TPB Information Sheet *TPB(I) 20/2014 What is a tax (financial) advice service?* available on the TPB website at www.tpb.gov.au
4. An entity must be registered as a tax agent or BAS agent to provide a 'tax agent service' or 'BAS service' for a fee or other reward (see paragraphs 7 to 15 for information on the meaning of 'tax agent service' and 'BAS service').
5. It is important to note that the fee does not necessarily have to be separately charged to the client. It can form part of a bundle of services offered by the contractor to the client.
6. Although the TASA talks about the use of contractors in the provision of tax agent services, there are no separate or specific legislative provisions relating to whether contractors need to be registered under the TASA.



Tax agent service

7. A 'tax agent service' is any service that relates to:

- ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law or
- advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law or
- representing an entity in their dealings with the Commissioner of Taxation (Commissioner) and

that is provided in circumstances where the entity can reasonably be expected to rely on the service to satisfy liabilities or obligations, or to claim entitlements, that arise or could arise under a taxation law.

8. A tax agent service includes, but is not limited to:

- preparing or lodging a return, notice, statement, application or other document about a taxpayer's liabilities, obligations or entitlements under a taxation law
- giving a taxpayer advice about a taxation law that the taxpayer can reasonably be expected to rely upon to satisfy their taxation obligations and/or
- dealing with the Commissioner on behalf of a taxpayer.

9. A taxation law includes BAS provisions and as such the definition of tax agent service includes BAS services.

10. Any decision about whether a service constitutes a tax agent service or BAS service requires consideration of all the facts and circumstances to determine if the client can reasonably be expected to rely on that service.

11. Sometimes parties to a transaction might attempt to use 'disclaimers' to negate or to deny that certain results will occur or that a state of affairs exist, or simply state that it will not exist. An example could be whether the provider of the service will accept any liability for a transaction. Another could be that the party receiving the service should not rely on it.

12. Whilst the TPB will consider a disclaimer in determining if a person could reasonably be expected to rely on a service, the mere existence of a disclaimer alone will not be determinative of whether any reliance was placed on the service and was reasonable. Evidence of in-house practices and procedures that limit the service may also be relevant, as may other evidence of the circumstances.



BAS service

13. A 'BAS service' is a 'tax agent service' that relates to:

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

that is provided in circumstances where the entity can reasonably be expected to rely on the service to satisfy liabilities or obligations, or to claim entitlements, that arise or could arise under a BAS provision.

14. A BAS service therefore includes, but is not limited to:

- preparing or lodging an approved form about a taxpayer's liabilities, obligations or entitlements under a BAS provision
- giving a taxpayer advice about a BAS provision that the taxpayer can reasonably be expected to rely upon to satisfy their obligations and/or
- dealing with the Commissioner on behalf of a taxpayer in relation to a BAS provision

15. Under section 995-1 of the *Income Tax Assessment Act 1997*, BAS provisions means:

- Part VII of the *Fringe Benefits Tax Assessment Act 1986* (the collection and recovery of tax provisions)
- Indirect tax laws, including goods and services tax (GST) law, wine equalisation tax (WET) law, luxury car tax (LCT) law and fuel tax law and
- Parts 2-5 and 2-10 in Schedule 1 to the *Taxation Administration Act 1953* (the pay as you go (PAYG) withholding and instalments systems)

16. A BAS service also includes any service which the TPB, by legislative instrument, specifies to be a BAS service.¹

Circumstances where a contractor does not need to register as a tax agent or BAS agent

¹ See subsection 90-10(1A) of the *Tax Agent Services Act 2009* and *Tax Agent Services (Specified BAS Services) Instrument 2016*.



17. The following are examples of services that may be provided by a contractor without having to register as a tax agent or BAS agent:

Example 1

The contractor provides services **for** a registered agent as an employee (including as someone who the law regards as an employee, despite describing oneself as an independent contractor), and the registered agent receives the fee or other reward for the provision of the services.

The TPB considers that a contractor who provides services for a registered agent is similar to an employee who provides services for an employer. In this case, the contractor may be on an hourly rate, but the contractor is performing services for the registered agent and does not separately charge fees to the client. Rather, the registered agent charges and receives fees for the provision of services and the client relies on the work of the registered agent, not the contractor.

Example 2

The services provided do not meet the definition of tax agent service (which includes BAS services²).

The contractor may provide services which do not meet the definition of tax agent service without having to register as a tax agent or BAS agent.

Example 3

The services are provided under an arrangement where the obligations of the contractor are to procure tax-related advice from a registered tax agent or BAS agent and that registered agent will be responsible to the client in relation to that advice.

In this case, the TPB considers that the contractor is not required to register if, under the arrangements surrounding the issue of the advice:

- the information constituting a tax agent service is to be, and is in fact, provided by a third party
- the third party is a registered tax agent or BAS agent who is clearly identified in the report or document in which the advice is contained as the provider of the tax agent service
- the third party tax agent or BAS agent is responsible to the client for the accuracy of the information that constitutes the tax agent service and

² Refer to *BAS services* on the TPB website at www.tpb.gov.au for information (including a table of examples) on the types of services that may and may not constitute a BAS service under the TASA.



- the information that constitutes the tax agent service is clearly identified within the report or other document. For further information, refer to the TPB Information Sheet *TPB(I) 08/2011 Reports or other advice incorporating tax agent services provided by a third party* available on the TPB website at www.tpb.gov.au

Circumstances where a contractor may need to register as a tax agent or BAS agent

18. The following are examples of services that may be provided by a contractor, which the TPB considers would be covered by the definition of tax agent service (which include BAS services) and are likely to require the contractor to be registered:

Example 1

The contractor provides a service **to** a client (which could include a registered tax agent or BAS agent) for a fee or other reward, and the client relies on the services.

The TPB considers that a contractor who provides services to a client, and receives a fee or other reward for the services (other than a salary or similar payment) is providing services in their own right. In this case, if the services provided fall within the definition of 'tax agent service', and if the client relies on the service, the contractor most likely will need to be registered.

Example 2

The contractor provides services **through** a registered agent.

The TPB considers that a contractor who provides services to a client, for a fee or other reward, through a registered tax agent or BAS agent will be required to register if the service provided falls within the definition of 'tax agent service', and the client relies on the service. It does not matter whether the registered agent also receives a fee or other reward in relation to the services provided. A common example is where a contractor lodges a Business Activity Statement (BAS) for a client through a registered agent.

19. If an unregistered contractor provides a tax agent service or BAS service for a fee or other reward, the contractor will contravene a civil penalty provision. In this case, the TPB may apply to the Federal Court for an order requiring the contractor to pay a civil penalty, or may seek an injunction to restrain the contractor from engaging in the unregistered conduct.



Options available to contractors

20. If a contractor is not providing a tax agent service or BAS service for a fee or other reward, they will not be required to register with the TPB.
21. However, if a contractor intends to provide a tax agent service or a BAS service for a fee or other reward, the following options are available:

Subject to meeting the eligibility requirements, the contractor could register as a tax agent or BAS agent.

For individual applicants, this includes being a fit and proper person and having appropriate qualifications and relevant experience.

For partnership or company registration, this does not necessarily require the person providing the service, for example the employee, to be registered in their own right. The partnership or company can be registered if they have a sufficient number of registered individuals, being registered agents, to provide tax agent services to a competent standard and to carry out supervisory arrangements.

Further information about the registration requirements is available on the TPB website at www.tpb.gov.au.

The contractor could work for a registered tax agent or BAS agent.

This requires the contractor to perform services for the registered agent who then provides services to the client for a fee or other reward. The registered agent must comply with its obligations under the Code, including ensuring that any tax agent service it provides, or that is provided on its behalf, is provided competently. In addition, the registered agent must also ensure all civil penalty obligations under the TASA are met including that they supervise and control relevant work that the contractor does.

Observations about employment situations

22. Employees of registered tax agents or BAS agents are not necessarily required to be registered with the TPB. A registered tax agent or BAS agent company or partnership might need or choose to have some of its employees registered under the TASA in order to meet the "sufficient numbers requirement"³ of the company or partnership. The purpose of this requirement is to ensure that services are provided competently and that there is supervision.

³ Under the *Tax Agent Services Act 2009*, registered agents that are companies or partnerships must have a sufficient number of individuals, being registered tax agents or BAS agents, to provide tax agent services or BAS services to a competent standard, and to carry out supervisory arrangements.



23. Some individuals who are doing tax related work, including work which might ordinarily be regarded as a tax agent service or BAS service, might choose to remain as employees and not be registered with the TPB. So long as the entity that charges and/or receives a fee or other reward for the tax agent service or BAS service is registered, the arrangement will meet relevant requirements under the TASA.

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