

# TAX - ACTION



## TAX AGENTS & LEGAL SERVICES –ARE YOU AT RISK?

For some time now we have been concerned that tax agents may be at risk when they provide certain services to their clients. Unresolved concerns exist where tax agents do any of the following for their clients:-

- draft trust distribution resolutions or minutes;
- draft or use Division 7A loan agreements;
- draft, use or establish trust deeds; or
- provide advice on State taxes.

If you do any of these things, you should read on as you may be taking risks and breaching laws without realising it!

Whilst practitioners are providing services that are additional or incidental to their accounting and tax agent services unless they are also a legal practitioner it is likely they are providing legal services in contravention of State laws and probably outside their PI insurance policy. This article does not purport to give advice in relation to those matters but merely points out the potential risks of providing these services.

The contents of this publication are for general information only. They are not intended as professional advice and you should consult a qualified accountant or other suitably qualified professional. Whilst all care and diligence has been exercised in the preparation of this publication, GuSTAX Consulting Pty Ltd (Just Tax Consulting) expressly disclaims all liability for any loss or damage arising from reliance upon any information in this publication.

### What services do tax agents and accountants provide?

Most accountants / tax agents in practice (regardless of their membership body) provide a plethora of services to their clients including accounting, taxation, corporate services, audit, financial planning, salary packaging agreements, etc. Accountants have become a one stop shop for many tax and business services. Some of these services do require specialist registrations. Accountants providing tax agent services must either be a registered tax agents or a lawyer in practice. Similarly auditors generally need to be registered to provide audit services. Where practitioners provide services in a multitude of areas they may require several registrations.

Despite all of this, many services cannot be pigeon-holed into accounting, taxation, auditing etc. Some examples of the wide range of services many accountants / tax agents also provide include:-

- Establishing and interpreting trust deeds.
- Drafting distribution minutes / resolutions, capital advancement minutes / resolutions and vesting resolutions / minutes for trusts.
- Interpreting contracts to determine the correct GST, CGT and income tax outcomes and their financial impact on their client's affairs.
- Interpreting finance documents to determine whether they are leases, hire purchase agreements or some other form of finance and recommending different types of finances to achieve tax and other outcomes.
- Arranging Division 7A loan agreements and similar legally binding agreements for the benefit of their clients to provide taxation safe harbours.
- Interpreting Corporations Law for the benefit of their clients.
- Advising on State taxes and imposts like payroll tax, stamp duty, land tax and Workcover including attesting to the accuracy of remuneration declarations.

Typically those practitioners who work in the business services area provide most or all of the above services (amongst many others) in addition to taxation, accounting and corporate advisory services. For the purposes of this article only, we will refer to the services listed above as “additional services” from now on.

This article is essential reading if you are only classified as an accountant or tax agent and you engage in any of these activities in your practice as you may be inadvertently trading without PI coverage and you may be breaching the law.

### Legislative framework

Whilst registered tax agents are effectively allowed to provide taxation advice under the Tax Agent Services Act 2009, interpreting law for the benefit of your clients may also be considered to be engaging in legal practice and therefore in breach of the Legal Profession Act or Legal Practice Act of the relevant State in which these services are provided. When tax agents interpret Federal taxation laws it would seem clear that they are engaging in legal practice as they are providing advice in respect to the application of law. State laws generally prohibit persons other than lawyers from engaging in legal practice and make it an offence to do so. Fortunately Section 109 of the Constitution provides that a Federal Law will generally overrule a State Law but only to the extent of any inconsistency.

**109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.**

It is the popular view that Tax Agents (who are not also lawyers) are therefore allowed to engage in legal practice provided it is restricted to the provision of taxation services or ancillary services with a direct link to taxation services. Assuming this is correct, tax agents may still be engaging in legal practice when they provide some or all of the additional services listed earlier as these do not appear to be tax agent services or ancillary services directly linked to taxation services. Therefore clarification of what is a tax agent service and what is a service directly linked to a taxation service is required. Furthermore it needs to be established whether or not the additional services listed earlier and for that matter other similar services are considered tax agent services or ancillary services directly linked to taxation services as if they are not many accountants may be inadvertently breaching State law.

## About the Editor

Tony Evans is a Chartered Accountant who has extensive tax consulting experience over 30 years working in the profession. The Managing Director of GuSTAX Consulting Pty Ltd, he was previously a partner with a boutique tax division in one of the mid-tier accounting firms in Melbourne. Tony's diverse tax specialisations include: -

- Income tax
- CGT
- GST
- Employment taxes
- Corporate Taxes
- CGT
- PAYG
- Taxation of trusts

He is recognised as an excellent communicator and trainer and has conducted numerous technical sessions for the ICAA and members of the profession.

### TAX CONSULTING SERVICES

Tony provides taxation consulting services exclusively to tax agents and the accounting profession at reasonable rates including a telephone advisory service. Contact Gustax Consulting Pty Ltd for more details on (03) 9884 1187 or by email to [tony@justtax.com.au](mailto:tony@justtax.com.au) ♦

A tax agent service is defined in Section 90-5 of the Tax Agent Services Act 2009 as follows:-

- (1) A *tax agent service* is any service:
  - (a) that relates to:
    - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a \* taxation law; or
    - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
    - (iii) representing an entity in their dealings with the Commissioner; 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 taxation law;
    - (ii) to claim entitlements that arise, or could arise, under a taxation law.

The term “taxation law” takes its meaning from Section 995-1 of the Income Tax Assessment Act 1997:-

*taxation law* means:

- (a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or
- (b) legislative instruments made under such an Act (including such a part of an Act); or
- (c) the *Tax Agent Services Act 2009* or regulations made under that Act.

Therefore we believe providing advice in relation to any State or Commonwealth legislation such as the Trademarks Act, Copyright Act, Payroll tax, land tax, stamp duty etc which is not included in the taxation law definition above will not be a tax agent service or an incidental service directly related to tax agent services.

One of the difficulties here is determining what services are not tax agent services or incidental services directly related to the provision of tax agent services. We believe that the other additional services previously listed may not be tax agent services or ancillary services directly related to taxation services as per the definition. If we are correct, then it may be illegal for any tax agent that is not a lawyer to provide these additional services under the various legal profession acts (or equivalents) of each State. We note that the list is not all inclusive and we are certain there are other services provided by tax agents which fall outside the definition of taxation law and may be considered engaging in legal practice.

This issue has not arisen out of the Tax Agent Services Act 2009 as a similar conflict arose between the Legal Profession Acts / Practice Acts and the Income Tax Assessment Act 1936 and in particular the repealed Section 251L. The conflict has been around and ignored for a long time.

### **Sinclair’s Case**

In *Sinclair v Commissioner of Taxation* [2010] AATA 902 a tax agent, who was an accountant but not a lawyer, was criticised by Deputy President S A Forgie as having no right to give the advice that was subject to litigation. Paragraph 92 of her judgement notes:-

.....Mr Jasper is a Fellow of the Tax Institute of Australia but he could not give legal advice regarding the taxation implications of the arrangements.

In making this observation in her decision, her footnote to the above comment was:-

*Section 2.2.2(1) of the Legal Profession Act 2004 (Vic) provides that “A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.”*  
*Section 2.2.2(2) provides for a number of qualifications to the prohibition and notes another provided for in the Estate Agents Act 1980 (Vic) but none applies to an accountant.*

To understand the violation made by the accountant we need to understand what he did. The case centred around whether or not the taxpayer could claim a deduction for interest on a property which was allegedly going to be used to generate income but subsequently was not. The twist was the interest related to the vendor’s existing loan and the taxpayer was the purchaser of the property. The taxpayer paid the interest to the vendor’s financier as part of the purchase contract for the property.

The Deputy President's criticism of the tax agent stems from the fact that it appears that the tax agent tried to arrange or contrive the contract to achieve the deduction for his client and then provided advice that the interest was in fact deductible. Thus the agent's advice was not restricted to whether or not the interest was deductible but he effectively provided advice on the drafting and/or interpretation of the contract to purchase the property. He appears to have attempted to manipulate the payment to resemble interest paid by his client rather than reflect it as a portion of the purchase price. The provision of this advice was considered to be engaging in legal practice and outside "a tax agent service".

### What services are at risk?

Our list of additional services provided some examples of where a tax agent may cross the line. We have expanded on these to show why we believe them to be legal rather than taxation services and therefore potential exposures for tax agents who provide such services. We do not believe that they are considered tax advice or ancillary services directly related to tax advice.

- ***Establishing and interpreting trust deeds.***

When an accountant / tax agent establishes a trust deed, they need to nominate persons into various roles. They need to consider who should be the settlor, the trustee, the primary beneficiaries etc. Deciding who fulfills those roles can have significant trust and family law ramifications down the track. Determining whether one or both spouses or for that matter

## **TAX TRAINING FOR YOUR PRACTICE**

Before you renew your tax training with your current training provider – check out what else is available.

Gustax Consulting offers significant advantages compared to many other trainers. These include:-

- Highly reputable trainer in Tony Evans, our in-house tax specialist. You get a trainer that provides tax advice to tax practitioners and is not just a training presenter.
- *Best value for money in town – starting from \$1,190.00 (GST inclusive - 2012 year rate) per two hour session in Suburban Melbourne. This includes a tax update and a special topic each month.*
- Practical based sessions that tell you what is relevant for your practice. We ask you what you want and tailor accordingly!
- *Guaranteed to get the same highly skilled trainer each session resulting in continuity in your training.*
- Comprehensive Tax Update notes each month
- *Extensive list of special topics to choose from with detailed papers – and you get to choose when you want the topic!*
- Training is provided at your premises to all of your staff at a mutual time of convenience – No need for you to travel.
- *Our trainer has over 20 years track record of high quality service in training.*
- Groups of up to 20 people allowed in sessions and you can share costs with others by putting groups of firms together.
- *Our training includes numerous case study based sessions which relate to practical advisory situations that participants will experience in their working environment.*

***If monthly sessions don't suite – talk to us. We can provide flexible solutions to meet your practice's needs.***

Contact Tony Evans to find out more on: -

Telephone	9884 1187
Facsimile	9887 5325
Email	<a href="mailto:tony@justtax.com.au">tony@justtax.com.au</a>
Website	<a href="http://www.justtax.com.au">www.justtax.com.au</a>

their children should be the primary or named beneficiaries may potentially change outcomes when the trust is eventually vested. The definition of spouse in the trust deed or at law must be known and considered when determining whether to nominate spouses as specified beneficiaries or to assume they are a beneficiary under the general beneficiary clause of the deed. When selecting a pro forma trust deed to use, the accountant is exercising skill and care in that he/she is making a decision that the particular deed chosen suits and compliments the requirements of that client. In the decision of *Legal Practice Board v Computer Accounting and Tax Pty Ltd* [2007] WASC 184 the Court ruled that establishing a trust deed from a downloaded pro forma was engaging in legal practice. These services have nothing to do with providing tax advice and the fact that the trust can be used in a tax effective manner is a subsequent outcome.

Whilst the quality of trust deeds and their readability is improving, accountants regularly need to refer to the trust deed to determine what is net income and what is capital. They also need to determine such things as how to stream income, capital, franking credits or components of these. There are also many other reasons why accountants regularly refer to and interpret trust deeds. Whilst ultimately these decisions will have tax consequences, we believe advising on these matters may not be a tax agent service or an ancillary service directly related to providing tax advice. They relate to determining who gets the net income and the nature of the net income received. Whilst the advice may be tax driven, it involves the application of trust law. A trust deed is a legal document and interpreting that document is probably engaging in legal practice.

- ***Drafting distribution and vesting minutes / resolutions.***

Whilst a distribution minute or resolution usually only evidences the decisions made by the trustee, accountants regularly draft these minutes or resolutions on behalf of the trustee. Many accountants generally fail to properly consider the requirements of the deed when they prepare a minute. The deed may require a resolution in writing and some even require a resolution by deed. Care is required as the resolutions or decisions evidenced in the minutes should be strictly in accordance with the trust deed. This involves careful interpretation of the trust deed which we believe is engaging in legal practice. The complexity of many trust deeds makes this a difficult and meticulous exercise requiring skill in interpreting the trust deed and a good understanding of trust law. Determining the net income and how it is applied to the beneficiaries may or may not be a tax agent service. Beneficiaries are not taxed on their net income but are taxed on the portion of taxable income attributed to them based on how much net income under the deed they were entitled to. Drafting distribution minutes and resolutions is therefore likely to be engaging in legal practice. Drafting the distribution resolution is very likely to be more than ancillary or incidental to the provision of a tax agent service. It requires an exercise of skill and judgement and careful wording and therefore requires interpretation of a legal document and consideration of trust law.

- ***Interpreting contracts to determine GST, CGT and income tax outcomes.***

Accountants regularly read and review contracts for the sale of businesses and other assets to determine tax outcomes. Does GST apply or is the supply GST-free? Should the margin scheme apply? When did the contract become legally binding on the parties so the timing of the CGT Event can be determined? Is the contract legally binding where it can be rescinded if certain conditions are not met or is it not legally binding until certain conditions are met? How do various contract clauses like the indemnity, the golden handshake, the earn out or the stock valuation clauses work. These issues are all legal interpretations that lead to tax outcomes. Once the legal outcome is determined, the tax outcome can be ascertained. It is the job of the lawyer (and not a tax agent who is not a lawyer) to determine the legal outcomes and ensure they are achieved. Once this is achieved then the tax agent can determine the tax implications. Where the tax agent does both, the tax agent may be engaged in legal service.



We are quite often asked to review contract clauses to ensure that the correct GST outcomes are achieved. The correct (and self preservation) approach is to instruct the lawyer as to the required GST outcomes and tell them to ensure the clauses achieve those outcomes. The problem confronting many tax agents is that there are instances where lawyers have less understanding of the GST provisions and procrastinate thus transferring the responsibility of GST outcomes in contracts back to the tax agents. We have had regular direct experience where the lawyer drafting the contract had no idea of the various tax issues that had to be addressed or what their precedent contract clauses actually achieved.

- ***Interpreting finance documents to determine whether they are leases, hire purchase agreements or some other form of finance.***

The GST, income tax and FBT implications of car financing are diverse. The impact of hire purchase agreements is different compared to leases and chattel mortgages, and quite often it is left to the accountant to determine the nature of the legal document. Unfortunately reading the self serving description at the top of the document is of little value eg LEASE PURCHASE AGREEMENT and further investigation is usually required. We believe that determining whether a finance arrangement is a lease, hire purchase or chattel mortgage is engaging in legal practice and Tax Agents regularly do this without realising such services may be in breach of State Laws. In addition, recommending one form of finance over another is likely to be the provision of financial services and should probably be performed by a registered financial services provider.

- ***Establishing Division 7A and similar agreements for the benefit of their clients.***

Division 7A requires various taxpayers to establish legally binding agreements so that deemed dividends will not arise. Whilst these agreements are required to ensure taxation compliance, the only parties that can draft a legally binding agreement are the parties to the agreement and/or their legal counsel. Many accountants obtain standard loan agreements and complete them on behalf of their clients. This would seem to be providing legal services and engaging in legal practice.

Please note PS LA 2010/4 details the Commissioner's view of how accountants are to act in relation to some of the Division 7A provisions. This statement seems to incite Tax Agents to prepare these agreements and possibly engage in legal practice.

- ***Interpreting Corporations Law for the benefit of their clients.***

We note that the accounting standards are codified into the Corporations Law though this was not always the case. When an auditor signs off on a set of accounts as being true and fair and in accordance with the accounting standards, we presume they are giving a legal opinion that the accounts are in accordance with those standards and the law. We assume they are authorised under the Corporations Law to do this and therefore this power is legitimate and overrules the State legal practice/profession acts under Section 109 of the Constitution. We have not checked this and hope it is correct.

Should any accountant who is not a registered auditor give an opinion on a matter addressed in the Corporations Law, they may well be engaged in legal practice. This could happen where an opinion is given on the following:-

- Can the company pay a dividend?
- Do the non-audited general purpose financial statements comply with all relevant accounting standards?

- ***Advising on State taxes and imposts like payroll tax, stamp duty, land tax and workcover.***

We have already indicated that state taxation laws are not taxation laws covered by the Tax Agent Services Act 2009. They are not Federal tax acts under which the Commissioner of

Taxation has administrative powers. Some accountants regularly advise on payroll tax compliance. Some accountants sign off on Workcover and payroll tax annual returns attesting that they are correct, or regularly advise on land tax, stamp duty and related state taxes. All of these services require interpretation of laws and mean that the advisor is probably engaged in legal practice. It seems ludicrous that some of the provisions would seem to technically stop accountants who are not also lawyers from advising in these areas but then allow them to attest to the accuracy of the various returns!

### **What is the position of the legal profession?**

There seems to be apathy and acceptance in the legal profession that accountants can provide these services. In fact many legal practitioner firms request accountants provide these services partially because they are more economical than their own fellow practitioners. "Off the shelf" generic products such as trust deeds and Division 7A agreements used by tax agents fatten the legal practitioner's bottom line without affixing responsibility. The legal practitioner has no direct relationship with the ultimate user of the product and do not ascertain if the product is suitable for the ultimate user's needs. Virtually all the risk of whether the product meets the needs of the client is borne by the tax agent. It is possible that the lawyers may be at risk under the Law of Tort if they sell a negligently drafted product but this would be a difficult argument where another skilled professional acted as the provider of the product.

Accountants and tax agents cannot assume that this apathy will continue into the future. In the decision of *Legal Practice Board v Computer Accounting and Tax Pty Ltd* [2007] WASC 184 the Court ruled that downloading and completing a trust deed was engaging in legal practice. The case failed because the Legal Practice Board in Western Australia picked the wrong target. They took action against the accounting practice and not the contractor working for the accounting practice who obtained the trust deed. The Court accepted that a non-lawyer was engaged in legal practice when establishing a trust deed for a client but that the Legal Practice Board had prosecuted the wrong party. There is no reason to believe that the various state Legal Practice Boards (or equivalents) will not take on accountants in future actions and focus on the right person next time.

### **Should tax agents who are not lawyers be allowed to provide these services?**

Tax agents are required to complete legal subjects as part of the qualification requirements to become a tax agent and therefore have some legal knowledge. The Tax Practitioner Board and the Tax Agent Services Act acknowledge that to be a tax agent, you need to have some working knowledge of trust law, contract law, corporations law, law of contract etc. in addition to taxation laws. It is for this reason that they are rightly insisting that some legal subjects must be included in a tax agent's base qualifications.

The practical answer is that, in our experience, many tax agents (who are not lawyers) have developed the skill base to provide these additional legal services over time in a competent or more than competent manner. The other practical observation is that these services are currently being provided in the market and apart from the odd case, no one seems to care. There is also a supply and demand issue – tax agents appear to be the only professionals regularly providing these services.

Ignoring the legalities for the moment, it is our view that these additional services should only be provided where the party supplying them has the necessary skill and competency. Many accountants who are tax agents have these skills and have traditionally provided these additional services. In our experience many of these accountants are equal if not more capable than the average lawyer in providing these services and usually at a more economical rate. We therefore believe a law change is appropriate and necessary to enable accountants with the necessary skills to continue to provide these services. The difficulty is determining whether the accountant or tax agent has the necessary skills!

We do note that as per the Tax Agent Services Act consumer protection is ultimately the objective here. Therefore we only advocate that those persons who have the knowledge and skills to provide these additional services as part of or in connection with providing tax agent services should be

permitted to do so, and we would expect the Tax Practitioner Board, the various Legal Practice Boards and the Courts would take those advisors to task (whether they are lawyers or accountants) where such additional legal services were incompetently provided. Our concern is that many advisors are competently providing these services but may be inadvertently breaching the law where they do so.

### **What about professional indemnity insurance?**

We raised this legal services issue in an ethics forum at the 2011 Public Practitioner's Conference hosted by the ICAA at Creswick, Victoria in May of that year. We questioned a representative from the PI insurance companies as we wanted to know what position insurance companies would take where an action was taken against a tax agent in relation to the provision of incompetent advice like those mentioned earlier as additional services. Would they honour the claim or seek to avoid a pay out on the basis it was not covered by the PI policy?

Before proceeding to his reply, it should be noted that many tax agent PI policy wordings have exclusions for the following:-

- Engaging in legal practice.
- Wilfully or deliberately breaching the law.

The insurance representative indicated that most PI insurers were aware of the fact that many accountants provided additional legal services as part of providing their taxation and other services and that it was potentially illegal to do so. He also believed that pedantically where the claim arose out of those additional legal services, most companies could probably avoid paying out on the claim. He added that where the accountant made full disclosure that these services were being provided by them when the policy was taken out, it would be highly likely that the claim would be honoured. However he could not rule out the possibility that it would not.

Whilst this answer did not surprise us, it did surprise other ICAA members at the conference. Effectively an accountant will not be covered where he/she avoids providing these additional legal services and advertises as such then subsequently provides them resulting in a client suffering a loss. By comparison, where an accountant provides these services in complete ignorance of the possible illegality to do so, the claim may be covered depending on its magnitude. In that case the insurance company may still seek to walk away from the claim depending on the PI policy, the quantum of the claim, their relationship with the accountant and his/her ethics. This leaves many accountants / tax agents between the devil and the deep blue sea!

### **What are the accounting bodies doing about this issue?**

The answer is until very recently, apparently nothing. As a follow up from our attendance at the ICAA 2011 Public Practitioner Conference we immediately pursued the matter with the ICAA, but like any large bureaucracy, progress is slow. On our prompting, we were told that legal advice as to the risks associated with this conflict was being sought by the ICAA. We were later informed that this advice was finally received by the ICAA in January / February 2012 and a copy would be onforwarded to us with an additional copy to be posted on the ICAA website. Neither of these has occurred as of the date of this publication.

When we raised this issue with the ICAA, we pointed out that as a member in public practice, we had never once been told of the potential risks of providing additional legal services or that doing so may be illegal. As the ICAA conducts quality reviews of all members in practice, we considered this to be a major oversight. Members need to be informed about what they can and can't do!

We are hoping that the ICAA will lobby to have the law changed assuming the legal advice confirms the concerns expressed in this article. Having said that, we are not the only tax professional who has these concerns. Those interested should also look at the feature article prepared by Chris Wallis, Barrister – Victoria Bar (Greens List) published in Taxation in Australia (Volume 45(10)) which



provides a far more technical analysis of this issue. The article has been published on our website (with permission) and can be downloaded from:-

[http://www.justtax.com.au/latest\\_news.htm](http://www.justtax.com.au/latest_news.htm)

We expect the advice requested by the ICAA will confirm our concerns. However we do not know what questions they have asked and whether they have properly addressed the concerns raised. We do not know if they will publish the advice or act upon it.

The most problematical outcome would be that the ICAA may tell its members to cease providing these additional services and would not invest sufficient resources to lobby the necessary law changes to enable them to continue providing these additional services.

At this point we note that we believe the ICAA is hopelessly conflicted. In fact we believe it is hard to find an accounting body that is not similarly conflicted. The ICAA membership base includes:-

- Members in practice
  - Tax agents
  - Liquidators
  - Auditors
  - Financial planners
  - Management consultants
- Lawyers who are also accountants
- Members in industry
- Members in academia
- Members in government

The ICAA used to represent accountants in practice but now most of its membership base is elsewhere. Seemingly its priorities are no longer to protect the interests of its tax agent members who are a small minority.

It should be noted that the ICAA is not alone in its lethargy as we verbally raised this issue with other accounting and taxation bodies at the Australasian Taxation Teachers Association conference in Sydney in January, 2012. Most of their representatives were not interested unless the other bodies decided to lobby as a unified force but how you get them to reach consensus is another matter. Others were aware of the issue and indicated that tax agents who were not in legal practice should not be giving this additional advice, whilst some ignored me as I was not a member of their body. However please note the former NIA published a shorter form of the Wallis Article mentioned earlier.

Accountants and tax agents in practice have been previously disappointed by the lobbying efforts of their accounting and taxation bodies. We only have to look at the area of financial planning where accountants have only just been informed they will have a carve out to provide limited general financial planning advice in an area that used to be one of several core features of many of their practices. In contrast financial planners have a carve out for additional tax advice associated with the provision of their financial services! Are they also at risk of illegally providing legal services—probably unless they are also a lawyer in practice.

Ultimately it is the accounting and tax bodies that need to instigate this change. To ignite their enthusiasm members of the ICAA, CPAs TIA etc. who are tax agents and not lawyers may need to remind their body about their obligations to members. Feel free to pass this article onto your accounting body and to ask them what they are doing here. The more pressure that is applied to the accounting and taxation bodies the more likely that they will lobby for your benefit.

The final point to note is that the accounting and taxation bodies cannot plead ignorance of this issue. The matter about protection against penalties when a tax agent who is not a lawyer in practice provides additional legal advice was recently raised with the ATO at the National Tax Liaison Group by the accounting bodies. The ATO confirmed that as long as the Tax Agent Services Act had been complied with and/or a reasonably arguable position had been established, the ATO would not be concerned. It seems that the accounting bodies are more concerned about penalties for taxpayers than the potential for their members to breach the law! It is alright for an accounting body to have a social conscience but at the expense of their members? The ICAA and other bodies need to have the situation clarified to ensure their members know where they stand. We believe they should also be lobbying for appropriate law changes to protect their members.

### **What law changes are required to allow tax agents to provide these additional services?**

There are numerous solutions to this problem but we believe all require legislative change. Several alternatives include:-

- Changing each State's Legal Profession Act (or equivalent)
- Changing the Tax Agent Services Act

There may be other alternatives.

Both alternatives raised by us are briefly addressed below.

- ***Change each State's Legal Profession Act (or equivalent)***

Patchwork or piecemeal legislation on a state by state basis in the 21<sup>st</sup> century is unacceptable but unfortunately common place. To avoid this outcome requires the co-operation of each State and Territory to develop uniform or model legislation in the style of the Corporations Act or workplace safety laws and therefore may be difficult to achieve.

- ***The exclusion approach***

The change required would be to add an exclusion from the application of each Legal Practice/Profession Act for registered tax agents when providing additional legal services associated with the provision of tax agent services. However this would also require a definition of what are considered additional legal services to ensure services like those addressed as additional services in this article are covered.

- ***The inclusion approach***

Alternatively the change could be to enable tax agents to be considered in legal practice for the purpose of each Act where they provide limited legal services such as the additional services previously mentioned in association with tax agent services. Again there is also a definitional problem of what are considered additional legal services.

Should the inclusion approach be taken, we note that this may also enable accountants/tax agents to claim legal professional privilege which of course is not currently available to them and which funnily enough is being lobbied for by some of the accounting and taxation bodies.

- ***Change the Tax Agent Services Act***

The second approach is to expand the Federal Act to allow registered tax agents to provide additional legal services associated with tax agent services and thus allow this Act to overrule the various State Acts. A reasonable definition of additional legal services would still be required here. However, the above recommendation will not address the issue of providing advice on state taxes as advice on state taxes has nothing to do with the provision of tax agent services. In addition, this also assumes that the Tax Agent Services Act is strong enough to provide tax agents with protection which is also uncertain at this time.

The first option is the preferred one but requires the cooperation of numerous State governments and therefore will be much harder to implement.

### **What are the risks in providing these services?**

In summary, the risks are as follows:-

- You may be prosecuted for breaching a State law.
- You may not have coverage under your PI policy if a claim is made against you in relation to this additional advice.

Unless you are singled out for prosecution, the risk will probably only arise where any of these services are provided incompetently or a client moves to a new accountant. However, tax agents should not operate on the assumption that they will never make mistakes with the advice they provide particularly in the current environment. Each tax agent should assess their own risk profile and make their own decision as to what services they are prepared to provide.

Ultimately, no one should be providing these additional services unless they have the knowledge and skill base to do so in a competent manner.

### **What can you do?**

The job of a tax agent has become more and more difficult over time. The law is becoming more complicated and it is difficult to attract and retain staff in the profession. We have an aging population of tax agents and many of them are wondering who they will sell their practices to in 5, 10 or 15 years time. Things will only get worse unless we take a stand to make things better.

We are one of a few voices on this issue and that probably needs to change if this issue is to be rectified. We recommend that members of accounting and taxation bodies bring this issue to their body's attention and ask for action to be taken. We suspect the ICAA and the other accounting / taxation bodies will act faster and apply more resources if enough of their members agitate this issue. Membership in any body is a two way street. You cannot expect them to fix problems if you don't tell them about those problems. Education is the basis for change.

We would not stop at contacting our accounting / taxation bodies. Our parliamentary representatives are our direct means of obtaining law changes. We should also be talking to our local members (State and Federal) and vent our concerns.

Please remember, if we all leave it to someone else, nothing will change and potentially someone will end up paying!!

GuSTAX Consulting Pty Ltd  
ABN 16 097 171 509  
(Just Tax Consulting)  
PO Box 5200 Studfield PO  
Wantirna South Vic. 3152  
Email: [tony@justtax.com.au](mailto:tony@justtax.com.au)

"Tax-action" is a registered Australian business name."

Copyright strictly reserved. No part of these Notes may be reproduced or copied in any form or by any means (graphic, electronic or mechanical, including photocopying, recording, taping, or information retrieval systems) without the written permission of GuSTAX Consulting Pty Ltd