The Tax Institute

9 February 2024

Alan Raine
Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By electronic upload

Dear Mr. Raine,

Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

The Tax Institute welcomes the opportunity to make a submission to the Senate Economics Legislation Committee (**Committee**) in respect of its inquiry and report on the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (**the Bill**) and accompanying explanatory memorandum (**EM**).

The Bill contains several key measures that are intended to strengthen the integrity of the tax system. These include:

- Schedule 1 – reform of the promoter penalty provisions contained in Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**);
- Schedule 2 – extending the whistleblower protections contained in Part IVD of the TAA;
- Schedule 3 – increasing the scope of information contained on the Tax Practitioners Board's (**TPB's**) Public Register, reforming the TPB's investigation powers, and allowing the TPB to make certain delegations; and
- Schedule 4 – increasing the information sharing powers between the Australian Taxation Office (**ATO**), TPB, Treasury and a Minister in instances where there is an actual or suspected breach of Commonwealth confidence.

We note that the Bill also contains measures proposing reforms to the Petroleum Resources Rent Tax in Schedule 5. It remains unclear to us why these completely distinct and unrelated regimes have been amalgamated into a single Bill. We have limited our comments in this submission to Schedules 1 to 4 to the Bill.

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We understand that the overarching objectives of these measures are to elevate the professional standards expected of all advisers operating in the tax system and to provide assurance to the public that these standards will be maintained and enforced appropriately. The Tax Institute supports these objectives.

It is important to ensure the community's confidence in the administration of the tax system and the fair participation by all taxpayers and their representatives. Most advisers strive to ensure that they meet the community's expectations and the professional standards of competency and ethical responsibility by which they are held to account. Proposed changes to address the misconduct of a small number of tax advisers should therefore be measured and proportionate. They should not result in an unduly onerous burden on all tax professionals, the vast majority of whom generally do the right thing, and should not inhibit the provision of independent, objective tax advice.

The promoter penalty provisions are proposed to significantly expand in scope and, among other things, apply to schemes promoted in purported compliance with a vast range of ATO guidance products. This may make it difficult to draw the line between a scheme that is appropriately within the scope of the promoter penalty regime, and objective tax advice. Further, there being no intention threshold requirement for the rules to apply may exacerbate this issue and may have the unintended consequence of impacting the provision of genuine objective advice. The potential for unintended serious consequences should be carefully considered and addressed through a tightening of the drafting and an introduction of an intention threshold.

We also consider that the basis for the calculation of the maximum penalty for bodies corporate and significant global entities (**SGEs**) should be amended so it more accurately reflects the entity's actual fiscal position at the time of the contravention. This should more appropriately demonstrate the benefit received as a result of the advice provided.

We generally welcome the changes to the whistleblower protection regime though we consider that they should also provide protection for professional associations that make an eligible disclosure. This will better ensure that professional associations are appropriately protected when contributing to the safeguarding of the integrity of the tax system.

The whistleblower regime contained in Part IVD of the TAA should also be reviewed in light of the interaction with the breach reporting provisions contained in section 30-40 of the *Tax Agent Services Act 2009* (Cth) (**TASA**) which come into effect from 1 July 2024. By virtue of the breach reporting provisions, registered tax agents and BAS agents will be legally required to report certain suspected breaches of the Code of Professional Conduct (the **Code**) contained in the TASA by other registered tax agents and BAS agents, without any real protection against harassment, bullying, damage to property or businesses, financial loss or potential lawsuits. We consider this to be an inequitable outcome that is likely to have arisen due to the lack of consultation when the breach reporting provisions were introduced in the *Treasury Laws Amendment (2023 Measures No. 1) Act* 2023 (**TLAB1**).

Meanwhile, the changes to the TPB's Public Register will have important practical impacts on tax practitioners and the broader community. We consider it important to ensure that the Public Register is contemporaneous, accurate and displays relevant information (such as details of disqualified entities and unregistered preparers). This will better allow tax practitioners to streamline their onboarding processes and meet their obligations regarding the use of disqualified entities. It will also promote greater transparency and instil public confidence in the TPB and the tax profession.

The proposed changes to the information sharing regime are important to ensure that confidentiality over sensitive government matters is maintained. However, it is important to ensure that the measure achieves the appropriate balance with the fundamental requirement of preserving the confidentiality of taxpayer information. We also consider that consultation and a detailed framework is needed regarding the prescribed disciplinary bodies that can apply to receive disclosure of the relevant information and the expectations on those bodies.

Our detailed response in respect of each Schedule to the Bill is contained in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla,

Yours faithfully,

Scott Treatt

General Manager,
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President

APPENDIX A

We have set out below our detailed comments and observations on the measures contained in the Bill for your consideration. All legislative references are to the Bill unless otherwise indicated.

Reform of the promoter penalty laws

Concerns about the provision of independent, objective tax advice being brought within scope and the intention of the relevant entities

Our members have raised significant concerns regarding the perception that the expansion of the promoter penalty provisions may capture the provision of independent, objective tax advice.

Subsection 290-60(2) of Schedule 1 to the TAA currently provides that '…an entity is not a promoter of a *tax exploitation scheme merely because the entity provides advice about the *scheme.' This carveout relates to:

- subsection 290-50(1) of Schedule 1 to the TAA (*Promoter of tax exploitation scheme*);
- section 290-60 of Schedule 1 to the TAA (Meaning of *promoter*); and
- section 290-65 Schedule 1 to the TAA (Meaning of *tax exploitation scheme*).

The carveout does not explicitly relate to conduct described in subsection 290-50(2) of Schedule 1 to the TAA (*Implementing scheme otherwise than in accordance with ruling*).

There is a crucial element of intention on the part of the adviser with respect to the promotion of tax exploitation schemes in that it must be reasonable to conclude that it is implemented, or in the case that it is not implemented, if it were to be implemented, it would be done, with a sole or dominant purpose of obtaining a tax benefit. Intention does not feature as a requirement for the purposes of subsection 290-50(2). In cases arising under subsection 290-50(2), intention only comes into consideration once the matter has progressed to court and the Federal Court can consider exceptions such as reasonable mistake or reasonable precautions, under subsection 290-55(1) of Schedule 1 to the TAA, or where the entity did not know, and could not reasonably be expected to have known, that the entity's conduct would produce that result, under subsection 290-55(7) of Schedule 1 to the TAA.

We consider that it is important for the law to maintain the exception for advice under subsection 290-60(2) of Schedule 1 to the TAA and that an element of intention to achieve a tax benefit is introduced with regard to subsection 290-50(2). This is particularly important given the proposed expansion of the rules. Further, we consider that it is imperative that guidance is provided in this regard. Guidance should demonstrate what advice is for the purposes of the exception, and provide illustrative examples about what would and would not conceivably fall within the scope of these rules. We recognise that examples may not be able to cover every circumstance. However, they will help to provide some certainty to practitioners, and assurance to taxpayers that they are able to receive sound advice from their advisers, without their advisers being hindered by fear of serious ramifications.

Relevant schemes for the purposes of rulings other than product rulings

Subsection 290-50(1A) proposes to expand the operation of the rules to where a scheme has been promoted on the basis of conformity with a public ruling, product ruling or oral ruling but that scheme is materially different from the scheme described in the ruling (regardless of whether the scheme has been implemented). We understand that the intention is to capture circumstances where advisers promote schemes in a way that suggests that the ATO is comfortable with or otherwise approves the scheme when in fact it does not.

While this is consistent with the current policy, the proposed change extends the scope of these rules to a very broad range of ATO guidance products. For example, a public ruling includes any:

- written guidance by the Commissioner which states it is a public ruling;[1] or
- written advice published by Industry Innovation and Science Australia that states it is a public ruling in relation to certain aspects of the research and development offset regime.[2]

Paragraph 1.49 of the EM states the rationale for this approach:

> '…… By extending the promoter penalty regime to cover all public rulings, the intention is to cover as many rulings as possible that may be relied upon by promoters for false endorsement of a scheme as conforming with an ATO ruling. By extending the promoter penalty regime to cover private rulings, this amendment ensures promoters are also held accountable for their part in the promotion of conformity of a scheme with one described in a private ruling (as represented in an edited version or as set out in the private ruling itself) that is materially different.'

While we appreciate the intention behind the proposed expansion in order to protect consumers, we query its efficacy in practice. Edited private binding rulings (**PBRs**) that are published on the ATO's PBR register cannot be relied on by a taxpayer other than the taxpayer to whom the PBR applies, regardless of whether what is proposed conforms with what is described in the PBR. Key information regarding the scheme is removed from edited PBRs to ensure that the identity of the taxpayer is not disclosed, often resulting in only part of the scheme and relevant facts being described. Reliance by a party other than the taxpayer to whom a PBR applies affords that party no assurance that the Commissioner will apply the relevant tax law in the same way to their circumstances, and affords them no protection from interest or penalties. It should be incumbent on advisers, when referring to PBRs, to explain the lack of reliance for a taxpayer other than the taxpayer to whom the PBR applies and that PBRs are edited and do not necessarily contain all relevant details, and to advise on the merits of the taxpayer applying for their own PBR. It may be beneficial for the EM to articulate this.

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[1] TAA, subsection 358-5(3) of Schedule 1.

[2] Ibid, subsection 362-5(2) of Schedule 1.

While a scheme contained in a product ruling is generally readily apparent, other kinds of rulings such as traditional taxation rulings do not usually contain a scheme. Those rulings are generally a statement of the Commissioner's interpretation of law. Some taxation rulings include examples of how the Commissioner views the law as applying in particular cases. It is conceivable that such examples may be considered a relevant scheme, conformity with which could be promoted for the purposes of the promoter penalty rules. It is our view that the law should be clear whether it is intended to capture examples in taxation rulings in this way. In the case of rulings where no scheme is explicitly described, clarity should be provided as to how these provisions may apply, if at all.

Turnover for calculation of penalties

Subsections 290-50(4A) and (4B) propose to calculate the penalty imposed on promoters who are bodies corporate or SGEs based on their aggregated turnover for the most recent income year to end before the relevant breach occurred or began occurring.

We consider that this calculation should be based on the aggregated turnover of the relevant entity in the year in which the breach in fact occurred or began to occur, unless the entity has artificially reduced its aggregated turnover in that year, or the relevant data is not yet available to calculate the aggregated turnover. This would ensure that the potential penalty amount more accurately reflects the entity's actual fiscal position at the time of the contravention of the rules which resulted in the liability to the penalty. We consider this is important given that the penalties may only be imposed by the Federal Court and the processes of investigations and court proceedings are likely to take time. If the relevant turnover for calculation of penalties remains the most recent income year to end before the relevant breach occurs or begins to occur, we consider that the draft EM should explain the rationale for this approach.

Regardless of the way in which they are ultimately calculated, given the significant increase in maximum penalties, we consider that it is imperative that the scope of the promoter penalty rules is tightened and clarity is provided on areas identified above so that advisers are not inappropriately brought within scope for conduct that is not intended to be captured by the policy, and exposed to potentially devastating penalties.

Whistleblower protection changes

Protection for professional associations

As currently drafted, the draft whistleblower Bill does not afford the relevant protections to professional associations that on-disclose information originally disclosed to them by their members, even though the original disclosure may be protected. Many professional associations play an important role in educating and regulating parts of the tax profession, and in ensuring that tax advisers maintain high professional standards.

Without appropriate protections at law, professional associations will be precluded from sharing relevant information that may cause them to breach the *Privacy Act 1988* and their own by-laws. For this reason, we consider that it is important that certain professional associations, including The Tax Institute, are made eligible for the protections afforded under the draft whistleblower Bill.

Interaction with breach reporting provisions

Broadly, the current whistleblower regime contained in Part IVD of the TAA provides protection against bullying, harassment, injuries, and damages to businesses, property or the financial position of discloser who makes a protected disclosure to the ATO or other eligible receipts. Disclosers may also be able to claim compensation in some circumstances.

Schedule 2 of the Bill proposes to expand the protection for eligible disclosures made to the TPB, medical practitioners and psychologists. It also allows for regulations to be made regarding protected disclosures to prescribed professional associations.

Under the whistleblower regime, protections will apply to eligible disclosures[3] against an entity made by:[4]

- employees of the entity;
- associates (as defined in section 318 of the *Income Tax Assessment Act 1936* (Cth) of the entity;
- individuals providing goods or services to the entity; or
- an employee of an entity that provides goods or services to the entity.

As a result, protection will be provided to a limited group of disclosers, including partners in a partnership.[5] However, whistleblower protection does not extend to tax practitioners who are required by law to report actual or suspected breaches of the Code by unrelated tax practitioners.

The newly introduced breach reporting provisions, contained in section 30-40 of the TASA, create an obligation for registered tax agents and BAS agents to report other registered tax agents and BAS agents who have, or are suspected as having, breached the Code. Registered tax agents and BAS agents will be required to make the report in writing to the TPB and any professional associations of which the accused is a member if the disclosing practitioner is aware of an actual breach, or if they have reasonable grounds to believe there has been a breach. The relevant breach needs to be a 'significant breach' as defined in subsection 90-1(1) of the TASA.

The breach reporting provisions were introduced in TLAB1 and were not subject to any consultation with the tax profession or broader community. As a result, it appears that their interaction with other provisions, such as the whistleblower regime, was not taken into account.

This gap in protection is concerning for tax practitioners who will be legally required to make disclosures to the TPB and professional associations. If a tax practitioner's good faith disclosure of a suspected breach is not substantiated in subsequent investigations by the TPB, the disclosing tax practitioner may be liable to defamation or other actions commenced by the accused practitioner. We consider it unreasonable for tax practitioners to be placed in a position where their legal obligations may result in prosecution, business or property damage, financial loss, harassment or other harm.

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[3] TAA, section 14ZZT.

[4] Ibid, section 14ZZU.

[5] A partner is an associate of other partners and the partnership by virtue of the operation of section 318 of the *Income Tax Assessment Act 1936* (Cth).

Therefore, we consider that the whistleblower measure contained in Schedule 2 should be amended to provide protection for tax practitioners who are required to make a disclosure under the breach reporting provisions.

This will require consideration of:

- the definition of eligible disclosures in section 14ZZT of the TAA;
- the definition of eligible whistleblowers in section 14ZZU of the TAA;
- the definition of eligible recipients in section 14ZZV of the TAA; and
- the appropriate recourse for tax practitioners who make ineligible or knowingly false disclosures.

Tax Practitioners Board reforms

Unregistered entities in breach of the Tax Agent Services Act 2009

Proposed subsection 60-135(3A) provides that an entity that is not a registered tax agent or BAS agent must not be entered on or remain entered on the register maintained by the TPB except in certain circumstances outlined in that subsection.

The Tax Institute is of the view that where an unregistered entity is found by the TPB to be in breach of the TASA, that entity should be included on the register. This will provide assurance to members of the public who search the register, particularly if they have been misled to believe that the relevant unregistered entity is registered. This improves the overall integrity of the register and provides greater transparency to the public. This is consistent with the objective of the register outlined in paragraph 3.5 of the EM and will improve its quality and usefulness to better assist members of the public. Including such entities on the register will also serve as a deterrent to other unregistered entities from engaging in conduct that would breach the TASA.

Sanctions recorded on register

The draft Bill also proposes to provide the TPB with an option to publish information about a contravening entity, which, when determined, will require the TPB to publish the relevant details on the register. Such information can include detailed reasons for tax practitioner sanctions including terminations. Such information will be displayed on the register for five years from the date of the original decision. Paragraph 3.26 of the EM to the draft TPB Bill provides that the objective is to provide the TPB with an additional option to ensure the public is aware of an entity's misconduct, particularly where pursuing other sanctions may not be appropriate.

The Tax Institute is of the view that where details of a sanction are published on the register and that sanction has lapsed or has been otherwise remediated, the register should be updated to reflect this. For example, if a sanction is imposed that requires a practitioner to undertake certain actions, once those actions have been completed, the register should be updated to reflect the steps taken by the practitioner to address the issue.

Our suggested approach treats registered tax agents and BAS agents more fairly as it recognises efforts made to remediate misconduct. It also ensures that the public have a more fulsome understanding of the issues and how they have been addressed. This improves the overall integrity of the register and provides greater assurance to the public. This will be particularly important given the recent proposals to broaden the suite of sanctions available to the TPB in respect of tax practitioner misconduct, including interim and contingent suspensions.

Increase in information sharing powers

Importance of taxpayer confidentiality

Broadly, Schedule 4 of the Bill proposes to allow ATO officers and TPB officials to share confidential information with the Treasury and prescribed disciplinary bodies concerning entities who:

- breach, or are reasonably suspected to have breached, an obligation with the Commonwealth regarding confidentiality; or
- have undertaken, or are suspected to have undertaken, an act or omission that breaches the prescribed disciplinary body's code of conduct or professional standards.

Although there are necessary instances in which confidential information is required to be shared, confidentiality of taxpayer information is a fundamental pillar of Australia's tax system. The Tax Institute considers it important to ensure that any information that is shared under the proposed changes is protected from being shared further, or used for a purpose other than to:

- rectify the breach of Commonwealth confidence through the changing of relevant procedures or undertaking criminal investigations; or
- assist the prescribed disciplinary body in completing their investigation in respect of an actual or potential breach of their code of conduct or professional standards.

Further, it is important that the Government releases detailed guidelines establishing what constitutes a suspected action that could allow confidential information to be shared with Treasury, a Minister, or a prescribed disciplinary body. For example, the ATO or TPB should be required to have sufficient evidence demonstrating that, on the balance of probabilities, the entity's actions have resulted in a suspected breach of Commonwealth confidence or a prescribed disciplinary bodies' code of conduct or professional standards. Clarity concerning the protocols that need to be followed before confidential information is shared will provide greater public assurance that information is not shared prematurely or inappropriately, and will be protected from inappropriate further disclosure.

Prescribed disciplinary bodies

We understand that the prescribed disciplinary bodies with whom confidential information is proposed to be shared have not yet been determined. The factsheet accompanying the draft information sharing Bill states that applications will be sought from professional associations in early 2024.

We consider that further consultation should be undertaken on key aspects of the selection criteria, including:

- the relevant breaches of a professional association's code of conduct or professional standards that need to have occurred, or be reasonably believed to have occurred, before information is shared;
- when the information will be shared, and instances where it is appropriate for the sharing of information to be delayed or expedited;
- procedures and expectations around the sharing of information within a professional association;
- the details of the safeguards that professional associations need to have in place to ensure that the information remains confidential; and
- the minimum standards of investigations and appeal rights that professional associations need to have in place to ensure there is a fair process.

Consultation and clarity around these aspects will ensure that the decision-making process and criteria for the selecting professional associations is transparent and subject to the appropriate debate.