



19 April 2023

Senator Jess Walsh
Chair
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Senator Walsh

SUPPLEMENTARY SUBMISSION—TREASURY LAWS AMENDMENT (2023 MEASURES NO. 1) BILL 2023

1. The Business Law Section (**BLS**) of the Law Council of Australia was pleased to provide a submission to the Senate Economics Legislation Committee (**Committee**) on 31 March 2023 in response to the Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (Cth) (**Bill**).
2. Further to that submission, the Law Council now wishes to raise two further significant issues which it has identified in relation to Schedule 3 to the Bill which seeks to amend the *Tax Agent Services Act 2009* (Cth) (**TASA**). The Law Council is grateful for the assistance of the Victorian Bar and the Taxation Committee of the BLS in preparing this supplementary submission.

Retrospective operation

3. The Bill impacts any individual that is a 'disqualified entity' (**DE**) at the commencement date. An individual will be a DE if any of the events in proposed subsection 45-5(2) of the TASA have occurred within the last five years. This introduces a concerning retrospective element because a decision may have been taken by an individual prior to the commencement date based on the operation, at that time, of the TASA.
4. This issue can be illustrated by the following example:

X was sanctioned by the Tax Practitioners Board (**TPB**) in 2019. They did not agree with the decision of the TPB but agreed not to appeal that decision to the Administrative Appeals Tribunal in the knowledge that they could obtain work with a registered tax agent after the relevant period of reregistration (typically only 12 months, or up to 24 months). However, under the changes proposed by the Bill, this individual would not be able to obtain work with a registered tax agent before 2024 unless they applied and were able to obtain approval of the TPB.
5. The retrospective element of this Bill is not addressed in the Explanatory Memorandum (**EM**) including the explanation regarding the human rights implications (paragraphs 6.15 to 6.19) and right to work (paragraphs 6.20 to 6.29).

6. Principle 1 of the Law Council's Rule of Law Principles states that the 'law must be both readily known and available, and certain and clear'.¹ As part of this principle, the Law Council emphasises that people must be able to know in advance the implications of their decisions and therefore that legislative provisions that are punitive should not be retrospective in their operation.
7. It follows that practitioners subject to punishment/sanction prior to commencement, and who may have made decisions based on the legislation as it applied at the time, should not be subject to further punishment/sanction.
8. This is concerning where the Bill impacts the livelihood of professionals and decisions have been taken by those individuals not to seek to have a decision of the TPB externally reviewed on the basis of accepting a limited amount of suspension with the right to return to practice after that period of suspension concludes. The effect of the Bill would therefore be to retrospectively impose additional penalty to affected individuals.
9. The Law Council notes that some transitional provisions are set out in proposed section 45-20 for DEs existing on the commencement date. However, these provisions do not address the issue of retrospectivity.
10. To address the retrospective element of the Bill, the Law Council strongly recommends that Schedule 3 be amended to provide that proposed Part 4A of TASA would only apply to entities that become a DE from the commencement date of that Schedule.

Definition of 'disqualified entity'

11. Further, the Law Council is of the view that the definition of a DE is too broad and is inconsistent with Recommendation 6.4 of the *Independent Review of the Tax Practitioners Board*.²
12. As set out in the Bill, proposed section 45-5(2) of the TASA would extend to any action taken against an entity by the TPB and any circumstance where an entity has had its registration terminated. This appears to have led to some unintended anomalies. For example:
 - if the TPB were to issue a written caution under subsection 30-15(2) or an order under section 30-20 of the TASA, that individual would be a DE for 5 years; and
 - if the TPB terminated the registration of an entity with a non-registration period of one year (see subsection 40-25(1) of the TASA), that individual would be a DE for 5 years.
13. The Law Council recommends that the definition of DE should be amended to eliminate these anomalies and to align with Recommendation 4.6 of the *Independent Review of the Tax Practitioners Board*, which was intended to impact only individuals affected by any of the fit and proper events in the TASA (sections 20-15 and 20-45).³
14. The Law Council therefore suggests that an entity should:
 - only be a DE if the TPB finds that the individual is not a fit and proper person; and
 - cease to be a DE when any non-registration period imposed by the TPB expires.

¹ Law Council of Australia, [Rule of Law Principles](#) (Policy Statement, March 2011) 2.

² *Independent Review of the Tax Practitioners Board* (Final Report, 31 October 2019).

³ *Ibid* [4.43.2] and recommendation 4.6.

Contact

15. The Law Council would be pleased to discuss these issues further. Please contact Mr John Farrell, Senior Policy Lawyer, at _____, in the first instance.

Yours sincerely

Luke Murphy
President