Law Council
OF AUSTRALIA

Office of the President

16 February 2024

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

Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

The Law Council of Australia welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee's inquiry into the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth).

The Law Council's submission is **attached**.

The Law Council gratefully acknowledges the Taxation Committee of the Business Law Section for its contribution to this submission.

If the Law Council can be of any further assistance to the Committee in the course of its inquiry, please contact John Farrell, Executive Policy Lawyer,

Yours sincerely

Greg McIntyre SC
President

Law Council
OF AUSTRALIA

Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

Senate Economics Legislation Committee

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council gratefully acknowledges the Taxation Committee of the Business Law Section for its contribution to this submission.

Introduction

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee's inquiry into the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth) (the **Bill**).

2. The Bill consists of five schedules across two largely unrelated proposed areas of reform:

   - Schedule 1—PwC response—Promoter penalty law reform;
   - Schedule 2—PwC response—Extending tax whistleblower protections;
   - Schedule 3—PwC response—Tax Practitioners Board (**TPB**) reform;
   - Schedule 4—PwC response—Information sharing; and
   - Schedule 5—Petroleum resource rent tax deductions cap

3. As indicated in their title, the first four schedules to the Bill form part of the Government's response package to the so-called 'PwC tax leaks scandal'.[1] However, Schedule 5 seeks to amend the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) to cap the availability of deductible expenditure incurred by a person in relation to a petroleum project for a year of tax.

4. This submission is confined to Schedules 1–4 to the Bill.

PwC response measures—General comments

5. There can be no doubt that the PwC scandal has highlighted the need for reform to the regulatory arrangements that apply to tax practitioners. The Law Council welcomes the Australian Government's consideration of reforms with the broad objective of strengthening the integrity of the tax system, as set out in its joint Ministerial media release of 6 August 2023.[2] In particular, the Law Council supports the Government's public interest objective in ensuring that all members of a profession adhere to their professional and ethical responsibilities.[3]

6. However, in this submission, the Law Council identifies a number of key issues requiring further consideration. These issues include:

   (a) the highly disproportionate scale of the proposed new promoter penalty provisions and the application of these penalties to partners not involved in the contravention;

   (b) the desirability of a unified and consistent approach to whistleblower protection across the public, corporate and tax sectors;

   (c) the need for additional limitations on the subsequent disclosure of information provided by whistleblowers to limit the risk of undesirable disclosure of sensitive information;

[1] The Hon Dr Jim Chalmers MP, Treasurer, Senator the Hon Katy Gallagher, Minister for Finance, the Hon Mark Dreyfus MP, Attorney-General and the Hon Stephen Jones MP, Assistant Treasurer, Government taking decisive action in response to PwC tax leaks scandal (Joint Media Release, 6 August 2023).
[2] Ibid.
[3] Law Council of Australia, Professions must adhere to professional and ethical standards (Media Release, 6 August 2023).

(d) the necessary re-design of provisions to allow the TPB to publicise adverse decisions against an entity whose registration has been deliberately allowed to expire to ensure congruity with recent amendments in relation to surrender—this would ensure that the proposed new provisions are not overly broad and better align with the current legislative approach; and

(e) the need to ensure that an appropriate practice for information sharing between the Australian Taxation Office (**ATO**), TPB and legal profession disciplinary bodies is implemented.

Schedule 1—Promoter penalty law reform

Likely impact of the reforms

7. As noted in the Explanatory Memorandum for the Bill, the promoter penalty provisions in Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**) were introduced in 2006 to deter the promotion of tax avoidance and tax evasion schemes, where the benefit to be claimed is not permitted under the law.[4] The promoter penalty provisions also penalise entities that intentionally or unintentionally misrepresent arrangements as being endorsed by the ATO through product rulings.

8. Schedule 1 to the Bill amends the TAA with respect to the promoter penalty provisions to:

- increase the time that the ATO has to bring an application for civil penalty proceedings to the Federal Court of Australia;
- increase the maximum penalty applicable; and
- expand the application of the promoter penalty laws.[5]

9. The Law Council supports the Government's desire to strengthen the integrity of the tax system, including by ensuring that the existing promoter penalty laws operate appropriately. However, the Law Council queries whether the amendments proposed in Schedule 1 to the Bill are necessary and proportionate.

10. The fact that the promoter penalty laws have only been applied in a limited number of cases is not of itself a sufficient reason for legislative change. Likewise, the fact that a few individuals were willing to use confidential government information to gain a financial advantage does not mean the laws do not work. Nor does the behaviour of a few mean that the existing penalties—which are substantial—do not operate as a sufficient deterrent.

11. The Law Council supports deterring the promotion of tax avoidance and tax evasion schemes. While it is plain that the matters reported with respect to PwC warrant serious consideration, caution should be taken to ensure that desirable behaviour is not also deterred. It is important that taxpayers retain the ability to obtain independent tax advice. This not only assists taxpayers in understanding their obligations, but the Commonwealth is also assisted when taxpayers have the benefit of advice that ensures they comply with the law and pay their tax.

[4] Explanatory Memorandum, Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth) [1.2] (**Explanatory Memorandum**).
[5] Ibid [1.1].

12. Stronger sanctions, particularly those proposed for a 'significant global entity' under the new scheme (discussed further below), may not solely increase deterrence. Faced with severe penalties, some may well be deterred from non-compliance. However, stronger sanctions may also induce other previously complying advisers to limit or temper their participation, thereby potentially compromising the availability of independent advice.

13. The Law Council is also concerned that technical breaches, where there is no intention to promote a scheme, may be caught under Schedule 1 to the Bill. For example, the dissemination of information by tax advisers about how a tax is applied is often a useful tool to help taxpayers understand the outcome of a particular court case and may imply that taxpayers should consider whether the outcome is applicable to their own circumstances. If the decision is later reversed (or a tax avoidance scheme is subsequently found to have existed) the question arises whether the dissemination of the information, in the first instance, would be caught.

14. Building on the concerns raised in the previous two paragraphs, the proposed addition of subsection 290-50(1A) and the proposed extension of subsection 290-50(2) to cover all forms of ruling create a risk that mere advice—and perhaps other unintentional conduct—will be caught. This would be contrary to the policy intent behind existing sections 290-60(2) and 290-65, which qualify the circumstances in which advice about a scheme is sufficient for an entity to be determined to be a 'promoter' of a scheme.[6] These provisions do not qualify subsection 290-50(2) nor the new subsection 290-50(1A).[7]

15. The Law Council recommends that equivalents to sections 290-60(2) and 290-65 be introduced to qualify the amended subsection 290-50(2) and the new subsection 290-50(1A). Without such qualifications, the Bill risks creating a less well-informed tax community by inhibiting the provision of independent advice.

Scale of the proposed penalties

16. The Law Council acknowledges that proposed civil penalties are designed to deter entities from treating them as a mere cost of doing business. However, the Law Council is concerned by the highly disproportionate scale of the proposed penalties and the application of those penalties to partners not involved in the contravention.

17. Proposed new subsection 290-50(4B) of the TAA appears to provide that each partner in a partnership that is a significant global entity is potentially subject to penalties of as much as 10 per cent of the partnership's turnover or 2.5 million penalty units.

18. This provision appears to apply the same maximum penalty on each partner of a significant global entity as is to be imposed on a corporation under proposed subsection 290-50(4A). At the current penalty unit of $313, 2.5 million penalty units would equate to a maximum penalty for each partner of approximately $782.5 million. This is a potentially exorbitant sum. However, noting the Court's discretion, in reality the penalty to be exacted may not really be this amount. The amount recoverable would inevitably be capped at the partner's net worth. In other words, the real maximum penalty is likely to be bankruptcy and loss of professional career

[6] *Taxation Administration Act 1953* (Cth) s 290-60(2) provides that 'an entity is not a promoter of a tax exploitation scheme merely because the entity provides advice about the scheme'. Section 290-65 then defines the term 'tax exploitation scheme' for the purposes of s 290-50(1).
[7] Possibly because when only divergent implementation of schemes described in product rulings was covered by subsection 290-50(2) it was not perceived that those sections needed to be expressly applied to subsection 290-50(2).

of each partner (including, those not involved in the breach). The Law Council queries whether the approach adopted under proposed subsection 209-50(4B) is a proportionate response.

19. Additionally, the alternative maximum penalty on each partner equal to 10 per cent of the partnership turnover would mean that a penalty equal to one years' partnership turnover would accrue for each 10 partners. This penalty amount will be unrelated to the actual benefit received. The likely real penalty would again be bankruptcy of the partners, together with dissolution of the partnership, loss of employment to the partnership employees and the cost and inconvenience of each client having to find a new accounting firm. Again, the question is whether such a penalty is proportionate to the alleged conduct.

20. Given that large partnerships may have many hundreds or even thousands of partners, the proposed amendment is extraordinary considering that only one lot of such penalties would be imposed on a corporation under proposed subsection 290-50(4A). The Law Council considers that the proposed amendments are excessive. Either the same treatment should apply to partnerships and corporations, or individual partners should be able to rely on the non-involvement defences.

21. Proposed subsection 290-50(4B) is made more draconian by proposed subsection 444-30(5), which precludes a partner from relying on the non-involvement defences in existing subsection 444-30(4) and the proposed amendments to subsection 290-55(2) to similar effect. This seems to run contrary to the reality that in large and multi-jurisdictional partnerships it is unrealistic (and practically impossible) to expect that each and every partner is aware of, and participates in, every decision made by other partners. The Law Council notes that, in the context of large multi-jurisdictional law practices and conflicts of interest among clients, the doctrine of imputed knowledge (which assumes that the knowledge one partner or associate possesses is knowledge that all partners and associates possess) is an assumption that is unrealistic in the era of the mega-firm. The trend in Canadian, US and Australian cases now favours imputed knowledge to be a rebuttable presumption.[8]

22. The proposed provision appears to rely on the partnership law concept of joint and several liability, disregarding culpability. While joint and several liability is perhaps appropriate in the context of the 'legitimate' business debts and obligations of the partnership, whether it remains appropriate in the case of every civil wrong committed by a partner is not straightforward. In the Law Council's view, it is not realistic or fair to impose a civil liability on each and every partner for a wrong committed by another partner in circumstances where the 'innocent' partner was not in a position to know or do anything to prevent the civil wrong being committed.

23. As an example of an alternate and preferable approach to contraventions by some partners within a partnership, the Law Council notes the approach taken to contraventions by a law practice in sections 35 and 470 of the *Legal Profession Uniform Law*:

> ***35 Liability of principals***
>
> *(1) If a law practice contravenes, whether by act or omission, any provision of this Law or the Uniform Rules imposing an obligation on*

[8] See, eg, Queensland Law Society, The Australian Solicitors Conduct Rules 2012 in Practice, Appendix B: Information Barrier Guidelines (November 2021) 144.

the law practice, a principal of the law practice is taken to have contravened the same provision, if—

(a) the principal knowingly authorised or permitted the contravention; or

(b) the principal was in, or ought reasonably to have been in, a position to influence the conduct of the law practice in relation to its contravention of the provision and failed to take reasonable steps to prevent the contravention by the law practice.

470 Contraventions by partnerships or other unincorporated bodies

(1) This section applies in respect of—

(a) an offence against a provision of this Law or the Uniform Rules; or

(b) a contravention of a civil penalty provision—

that is expressed as imposing an obligation on a law practice, or other entity, that is a partnership or other unincorporated body.

(2) A reference (however expressed) in the provision to the law practice or other entity is to be read as reference to each principal of the law practice or other entity who—

(a) knowingly authorised or permitted the conduct constituting the offence or contravention; or

(b) was in, or ought reasonably to have been in, a position to influence the conduct of the law practice in relation to its contravention of the provision and failed to take reasonable steps to prevent the conduct.

'Benefit' vs 'consideration'

24. The Law Council is also concerned about the proposed lowering of the threshold for the application of the penalties such that an entity need only receive a 'benefit', rather than 'consideration'.[9] This change will substantially widen the scope of the provisions to apply to persons and entities that would not otherwise be regarded as engaging in 'promotion' of tax schemes (or of mass-marketed schemes). For example, an employee of a business may be treated as a 'promoter' simply for carrying out tasks related to their employment, such as commenting on a range of options for a potential business restructure.

25. The Explanatory Memorandum suggests that, if the employee were to receive a 'benefit' (which might be as limited as a positive performance review), they could be subject to substantial personal penalties.[10] Further, in such a situation, the employee would not be protected by the 'employment' exception in existing subsection 290-55(8) as the penalty would not be imposed on their employer.

[9] Schedule 1, clause 31 of the Bill amending subsection 290-60(1)of the TAA.
[10] Explanatory Memorandum, [1.41]-[1.45].

Role of the ATO

26. Consideration of issues relating to the promotion of tax avoidance and tax evasion schemes should not focus solely on increased regulation and penalties as a way of combating unacceptable adviser behaviour. One of the ways in which the ATO has successfully managed to shape both taxpayer and adviser behaviour in the context of tax schemes is through its Product Rulings and Taxpayer Alerts. These types of products have largely eliminated a number of mass-marketed schemes and have achieved this without imposing additional compliance burdens on taxpayers. At the same time, having a regulator willing to identify and articulate the mischief sought to be stopped fosters an environment of transparency. This is to be encouraged.

Schedule 2—Extending tax whistleblower protections

27. Schedule 2 to the Bill seeks to amend Part IVD of the TAA to extend whistleblower protections to eligible whistleblowers who make disclosures to the TPB where they believe the information may assist the TPB to perform its functions or duties under the *Tax Agent Services Act 2009* (Cth) (**TAS Act**). Schedule 2 also seeks to reverse the burden of proof requirements where a whistleblower makes a claim for protection under Part IVD of the TAA such that the individual would bear the onus of substantiating their claim for protection.

Alignment with the whistleblower protection frameworks

28. The reforms would establish evidentiary burdens and procedures regarding claims for protection that align with the *Public Interest Disclosure Act 2013* (Cth) (the **PID Act**). The Law Council has long-held concerns with the operation and complexity of the PID Act, which are beyond the scope of the current Inquiry. The Law Council notes that the PID Act is currently the subject of review by the Attorney-General's Department and that Treasury has indicated that a statutory review of tax and corporate whistleblower laws will commence in late 2024.[11]

29. One matter that the Law Council considers worthy of further consideration is the prospect of conflict between the protections under Part IVD of the TAA and Part 9.4AAA of the *Corporations Act 2001* (Cth) when a disclosure qualifies for protection under both schemes in whole, or in part.

30. The proposed reforms have the potential to create inconsistent levels of protection between the TAA , Corporations Act and PID Act schemes, and there is a need to consider how this potential inconsistency is resolved. Such a scenario is a further example of the need for a more cohesive and unified whistleblower protection scheme, supported by a centralised whistleblower protection authority with oversight of the implementation of the whistleblower regime for both the public and private sectors.

Extension of protections to disclosures to other bodies

31. The Law Council notes that the Exposure Draft of Schedule 2 initially proposed to extend protections to disclosures to relevant professional associations, bodies that represent the professional interests of disclosers and registered organisations under

[11] See, Attorney-General's Department, Public sector whistleblowing stage 2 reforms (16 November 2023); The Treasury, Government response to PwC tax leaks scandal (Factsheet, 19 September 2023) 11.

the *Fair Work (Registered Organisations) Act 2009* (Cth).[12] However, proposed subsection 14ZZT(3A) (see clause 4 of Schedule 2) instead states that disclosures of information are also protected when made to an 'entity prescribed in the regulations' of which the discloser is a member. The Explanatory Memorandum anticipates that the organisations originally identified in the Exposure Draft may be prescribed in the future.[13] The Law Council supports this revised approach.

32. Requiring prescription through regulations provides an opportunity for the Government to more clearly and narrowly define those entities that should be captured by the new provision and better protect sensitive information and ensure that disclosures are not incorrectly made to entities outside the scope of the whistleblower regime.[14] The potential for the regulations to be disallowed also provides an opportunity for scrutiny by the Parliament.

33. However, the Law Council maintains its view that proposed subsection 14ZZT(3A) should be amended to place limitations on how information disclosed under subsections 14ZZT(3A) may be further disclosed by recipients.[15] Current permitted disclosures to legal practitioners under subsection 14ZZT(3) are subject to legal practitioners' obligations of confidentiality and are protected by legal professional privilege. Such disclosures therefore do not create unacceptable risks of undesirable disclosure of sensitive information. The same obligations are not necessarily in place for the additional bodies that might be prescribed in the future.

[12] The Treasury, Exposure Draft, Treasury Laws Amendment (Measures 4 for Consultation) Bill 2023: Extending 5 tax whistleblower protections (20 September 2023) cl 4.
[13] Explanatory Memorandum, [2.11].
[14] Ibid [2.12].
[15] See, Law Council of Australia, Submission to the Treasury, Proposed measures in response to PwC (4 October 2023) 11.

Schedule 3—Tax Practitioners Board reform

34. Schedule 3 to the Bill seeks to implement a second tranche of amendments arising from the Independent Review of the TPB.[16] The proposed amendments would increase the information published on the register of tax agents and BAS agents established and maintained by the TPB (the **Register**), remove the 12-month time limit for certain information to remain on the Register, extend the timeframe that the TPB has to conduct an investigation, and clarify the operation of provisions permitting delegation by the TPB.[17]

35. The Law Council supports, in principle, the measures contained in Schedule 3. The main exception is that the Law Council opposes the proposal to amend paragraph 60-125(2)(b) of the TASA by the addition of the proposed subparagraph (v).

36. While the Law Council supports the objective of that proposed new subclause (to publicise adverse decisions against an entity whose registration has been deliberately allowed to expire), in the Law Council's view, the proposed new subclause is too broad, and inappropriately seeks to remedy the mischief at which it is directed, leading to the potential for unacceptable consequences. Additionally, it is out of place and out of keeping with the scheme of the TASA because it conflates registration, investigations and publication—all of which are dealt with separately by the TASA.

37. The changes the Law Council suggests to the existing section dealing with the expiration of registration (section 20-35) are modelled on the 2021 amendments to the TASA (the **2021 Amendments**) to overcome voluntary termination of registration to avoid an investigation and sanctions.[18] Similarly, the changes the Law Council suggests should overcome the deliberate expiration (and non-renewal) of registration in order to avoid an investigation and sanctions. The Law Council respectfully submits that these changes will remedy the mischief without the potential of unintended consequences.

Breadth of the proposed reforms

38. Existing subsection 60-125(2) of the TASA comes under the general heading 'Outcomes of Investigations'. Subsection (1) deals with investigations of applications for registration; subsection (2) deals with investigations about whether 'the conduct breaches this Act'. Where the TPB, after an investigation, finds conduct that breaches the TASA, it currently has four options of action to take in relation to that conduct:

- impose administrative sanctions under subdivision 30-B;
- terminate registration under subdivision 40-A;
- apply to the Federal Court for a civil penalty under subdivision 50-C; or
- apply to the Federal Court for an injunction under section 70-5.

39. All of these options are based on expressly-referred-to substantive provisions of the TASA. Additionally, the first two options are subject to the publication requirements

[16] The first tranche of reforms was contained in Schedule 3 to the Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (Cth).
[17] Explanatory Memorandum, [3.1].
[18] *Treasury Laws Amendment (2020 Measures No. 6) Act* 2020 (Cth).

of section 60-135, which would be substantially expanded under the Bill. Publication of the outcome of civil penalty and injunction proceedings will take place in accordance with the requirements of the Federal Court. Accordingly, the existing section 60-125 deals only with the outcome of investigations and, in particular, sanctions which may be imposed under the TASA or further court procedures. All existing options under paragraph 60-125(2)(b) deal only with *sanctions* or further action—not on *publication*, which is expressly provided for under section 60-135.

40. The proposed new subparagraph 60-125(2)(b)(v) is wide enough to be misinterpreted as an open-ended additional alternate option to the four available under the present subsection 60-125(2) . As currently drafted, it would appear to offer the Board an open-ended or unrestricted option to publish details of a contravention as an alternative to imposing sanctions or applying to the Federal Court.

41. Paragraph [3.26] of the Explanatory Memorandum sets out the reason for the proposed new subparagraph 60-125(2)(b)(v) by instancing a situation 'where entities were registered at the time the investigation commenced, but had their registration expire without renewal before the conclusion of the investigation'.[19] To the extent that a deliberate failure to renew registration impedes the conduct of an existing investigation or precludes a pending investigation, the Law Council would support specific amendments modelled on existing subsection 40-5(3) of the TASA in the case of individuals, subsection 40-10(2A) in the case of partnerships, and subsection 40-15(2A) in the case of companies. These subsections were introduced as amendments in 2021 to overcome a similar situation to that referred to in paragraph [3.26] of the Explanatory Memorandum (that is, registration being surrendered to defeat or impede current or impending investigations). The Law Council respectfully suggests that similar wording to those subsections would overcome the suggested mischief.

42. Specifically, existing section 20-35 of the TASA could be amended by inserting new provisions (covering all entities—individual, partnership and company) that, notwithstanding subsection (b), registration would not expire at the end of the current period if the TPB considers that due to a current investigation or any new investigation within 30 days it would be inappropriate for such registration to expire. Like the result achieved by the 2021 Amendments, this would preserve the registration for the purposes of completing existing investigations and commencing new investigations. This would be even more effective if and when the registration period is reduced from three years to one year. Because the expired registration of an entity is extended by the proposed amendments to section 20-35, the sanctions of termination or suspension under paragraph 60-125(2)(b) would remain appropriate—just as they remain appropriate in relation to entities that purport to voluntarily surrender their registration.

[19] Exposure Draft Explanatory Materials, *Treasury Laws Amendment (Measures for consultation) Bill 2023: Tax Practitioners Board,* [1.19].

Scheme of the TASA

43. There are specific provisions in the TASA dealing with, for example:

- commencement and duration of registration (section 20-35);
- investigations (Subdivision 60-E); and
- publication (Subdivision 60-F).

44. By dealing with the specific mischief described in paragraph [3.26] of the Explanatory Memorandum by appropriate amendments to the relevant section covering registration (section 20-35), the scheme of the TASA would be maintained for the benefit of all stakeholders. As in the case of the 2021 Amendments, the scheme of the TASA and its logical sequence would be maintained.

Publication

45. The current provisions of section 60-135 of the TASA will apply to any sanctions imposed by existing paragraph 60-125(2)(b). This is similar to that which applies to entities that seek to avoid investigation and sanctions by voluntary surrender after introduction of the 2021 Amendments. The Law Council's alternative amendment to section 20-35, suggested above, should have the effect of continuing the registration of entities that would otherwise have deliberately expired and not been renewed in order to avoid any investigation and the imposition of any sanction as a result of breach.

Schedule 4—Information sharing

Suspected breaches of confidence

46. Currently, the ATO and TPB cannot share protected information with the Treasury about misconduct arising out of suspected breaches of confidence by intermediaries engaging with the Commonwealth. Measures in Schedule 4 seek to address this by ensuring that the ATO and TPB can share protected information with the Treasury about such misconduct (clause 1, adding new item 14 to the table at subsection 355-65(8) of the TAA, and clause 4, adding subsection 70-40(5) to the TASA). These measures also allow the Treasury to provide protected information disclosed to it to the Minister or Finance Minister in relation to a breach or suspected breach and any proposed measure directed at dealing with such a breach (clause 2, adding new section 355-181 to the TAA).

47. Disclosures are of information that concerns the breach of an obligation of confidence by a person against the Commonwealth or a Commonwealth entity, or reasonably suspected breaches, in circumstances in which the person is, or was at the time the obligation first arose, providing advice, or otherwise providing services, to a Commonwealth entity either:

- as an entity engaged by the Commonwealth entity for that purpose; or
- as an entity representing a taxpayer.[20]

48. Further clarification is required as to the scope of the proposed Treasury disclosure powers and the protection of the information shared. Under the new regime, the

[20] Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth) sch 4, cl 1 (see item 14 proposed to be inserted in the table at s 355-65(8) of the TAA).

Treasury will be permitted to seek legal advice about a course of action to respond to a breach, or suspected breach, or to 'consult with other agencies in relation to the work on a proposed response'.[21] Prescribing the agencies to which protected information may be disclosed (perhaps by way of a disallowable regulation-making power), would assist in ensuring that confidential information is appropriately confined.

49. The relevant draft Explanatory Materials note at paragraph [4.15] that:

> *The advice provided by an entity may have been as a service provider or as a taxpayer representative and was provided by means other than by public consultation. This could include but is not limited to private consultations, working groups and roundtables, where individuals were required to sign non-disclosure agreements, privacy agreements, or other such agreements with any Commonwealth department, agency, and body to ensure integrity and confidentiality in the policy development process. The advice provided does not need to be provided for a fee.*

50. It is possible that the Law Council may be considered to be an entity which provides advice to Government (free of charge), on behalf of the legal profession, at, for example, working groups and roundtables in the policy development process. It notes that as a matter of internal policy, the Law Council and its representatives would not sign non-disclosure agreements, although its representatives would be expected to fully respect the confidentiality of matters discussed. Individual members of the Law Council's Sections and Committees may choose to sign nondisclosure agreements when consulted in their individual capacity and not as representatives of the Law Council.

51. It is unclear whether the Law Council would be considered 'an entity representing a taxpayer' (not a defined term), which provides advice in the circumstances envisaged. It may be unlikely that the Law Council would be considered such an entity as one of its objects is to be the national peak body for lawyers on national and international issues in furthering the betterment of law in the public interest.[22] However, to promote certainty about the scope of the proposed measures, and broader expectations regarding the range of circumstances in which an obligation of confidence may arise, it would be helpful to expressly exclude peak professional bodies such as the Law Council from the scope of these provisions.

Information sharing with professional disciplinary bodies

52. Currently, the ATO and the TPB can share protected information with a professional association in relation to suspected misconduct by members only where such disclosures relate to the administration of the taxation law (an existing disclosure exception).

53. The Bill provides that the ATO and TPB can share protected information with prescribed disciplinary bodies, where they reasonably believe a person's actions may constitute a breach of the prescribed disciplinary body's code of conduct or professional standards. These changes are set out at Schedule 4, clause 1, providing for new item 15 to the table at subsection 355-65(8) of the TAA, and item 4, providing for new subsection 70-40(6) of the TASA.

[21] Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth) sch 4, cl 3. See further, Explanatory Memorandum, [4.23-[4.24].
[22] Constitution of Law Council of Australia Limited, Adopted on 16 April 2003, 2.1(b).

54. The proposed changes would permit disclosure to a professional disciplinary body that is prescribed for such purposes via regulation.

55. The disclosure would concern an entity and an act or omission that the taxation officer reasonably suspects may constitute a breach of the prescribed disciplinary body's code of conduct or professional standards, however described.[23] The disclosure must then be for the purpose of enabling or assisting the prescribed disciplinary body to perform one or more of its functions in respect of the entity.[24] Broader details of other entities (name, ABN contact details, personal information) must not be disclosed, unless the Commissioner is satisfied that the inclusion of the information is necessary for the purpose mentioned in (b).[25]

56. The measures in Schedule 4 to the Bill appear to broadly align with the Law Council's position as set out in its media release of 6 August 2023, as follows:

> *The Law Council supports amendments to the tax secrecy provisions to ensure that if the Australian Tax Office or Tax Practitioners Board have concerns about the professional conduct of legal practitioners (for example, the misuse of legal professional privilege claims, or promotion of tax avoidance schemes contrary to law), those agencies will be able to raise those matters directly with state and territory legal profession regulators and have them dealt with under the comprehensive legal profession complaints and disciplinary arrangements. The Law Council also supports legal profession disciplinary referrals where a legal practitioner breaches a personal confidentiality undertaking given to the Government. These existing disciplinary arrangements, operating across eight Australian jurisdictions, are strong and effective.*[26]

57. However, the Law Council is concerned about the proposed operation and implementation of the measures as outlined in the Explanatory Memorandum and the *Disclosure of information to prescribed disciplinary bodies* factsheet released by the Treasury in September 2023 alongside the Exposure Draft legislation (**Treasury Factsheet**).[27]

58. The Explanatory Memorandum at paragraph [4.29] states that:

> *Prior to prescribing any professional disciplinary bodies, consideration will be given to whether the body has appropriate processes and safeguards in place to ensure any disclosed information is dealt with in a way that allows relevant disciplinary processes to occur while ensuring the protected information is appropriately managed.*

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[23] Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth) sch 4, cl 1 (see item 15(a) proposed to be inserted in the table at s 355-65(8) of the TAA) and cl 4 (proposed ss 70-40(6)(a)-(b) of the TASA).
[24] Ibid, sch 4, cl 1 (see item 15(b) proposed to be inserted in the table at s 355-65(8) of the TAA) and cl 4 (proposed s 70-40(6)(c) of the TASA).
[25] Ibid, sch 4, cl 1 (see item 15(c) proposed to be inserted in the table at s 355-65(8) of the TAA) and cl 4 (proposed s 70-40(6)(d) of the TASA).
[26] Law Council of Australia, Professions must adhere to professional and ethical standards (Media Release, 6 August 2023).
[27] See The Treasury, Disclosure of information to prescribed disciplinary bodies (Factsheet, 15 September 2023).

59. The Treasury Factsheet envisages that the Treasury will be seeking applications from relevant professional associations to be prescribed disciplinary bodies.[28] Applying bodies will be expected to provide:

- a copy of the association's code of conduct or professional standards;
- information regarding its disciplinary process for breaches of the code of conduct, including scope and available sanctions; and
- information regarding how the association will ensure the appropriate treatment of any information disclosed by the ATO or TPB, including the management of privacy concerns.

60. However, the Treasury Factsheet provides that applying associations will also likely be expected to 'have procedures in place for the reporting of significant breaches to regulatory agencies'.[29] Further, this means providing a 'commitment to providing relevant information to the ATO or the TPB in relation to circumstances where relevant practitioners may have been involved in significant breaches of Commonwealth laws or other ethics standards'.[30]

61. This approach might be suitable for a fully self-regulating profession. However, it is not an appropriate solution for legal profession disciplinary matters, which are dealt with under State and Territory legislative schemes, as well as being an aspect of the inherent jurisdiction of Supreme Courts.

62. In each State, disciplinary powers and functions are exercised by statutory bodies, while in the Territories professional associations exercise those statutory powers and functions. The specific views of legal profession regulatory bodies responsible for exercising disciplinary powers and functions should be sought by the Treasury when implementing the proposed reforms. However, the Law Council's preliminary observations are that:

(a) Proposals that these bodies should apply to the Treasury in order to be prescribed disciplinary bodies are unusual and go beyond the Law Council's position that tax secrecy provisions should be amended to enable complaints to be raised with state and territory legal profession regulators to enable them to be dealt with under comprehensive legal profession disciplinary arrangements. It queries why there would be a need for a regulatory body of legal practitioners to demonstrate why it is such.

(b) The Law Council has particular reservations regarding the proposed requirement to provide relevant information to the ATO or the TPB about circumstances where relevant practitioners may have been involved in significant breaches of Commonwealth laws or other ethics standards.

63. As a point of reference, the Legal Profession Uniform Framework operates across Victoria, New South Wales and Western Australia. This Framework is the subject of an Intergovernmental Agreement and is made up of a Legal Profession Uniform Law; Uniform General Rules; Uniform Continuing Professional Development (**CPD**), Legal Practice, and Professional Conduct Rules for solicitors; Uniform CPD and Professional Conduct Rules for Barristers; and Uniform Admission Rules. The Framework has established a Legal Services Council, the objectives of which include ensuring the Framework remains efficient, targeted and effective, and

[28] Ibid 1.
[29] Ibid.
[30] Ibid.

promotes maintenance of professional standards. The Framework has also established a Commissioner for Uniform Legal Services Regulation, whose objectives include ensuring the consistent and effective implementation of the complaint and discipline provisions of the Uniform Law and supporting Rules.[31]

64. In the other States and the Territories, legal profession legislation is largely uniform—or at least harmonised—and is made up of a Legal Profession Act (Legal Practitioners Act in South Australia), Regulations and legal profession rules dealing with professional conduct, legal practice and CPD, and admission rules. All State and Territory legislation contains provisions for cooperation among regulatory authorities in the exercise of regulatory powers and functions.

Disciplinary schemes

65. Every State and Territory has a statutory scheme for handling complaint and discipline matters,[32] based on the same core concepts of unsatisfactory professional conduct and professional misconduct.

66. *Unsatisfactory professional conduct* is defined in legal profession legislation as including:

> *… conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.*[33]

67. *Professional misconduct* is defined in legal profession legislation as including:

> *(a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and*
>
> *(b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.*[34]

[31] *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, ch 8 ('*Legal Profession Uniform Law')*. Schedule 1 is adopted by *Legal Profession Uniform Law Application Act 2014* (NSW) s 4 and *Legal Profession Uniform Law Application Act 2022* (WA) s 6.
[32] *Legal Profession Uniform Law*, ch 5. See also *Legal Profession Act 2007* (Qld) ch 4; *Legal Profession Act 2006* (ACT) ch 4; *Legal Profession Act 2006* (NT) ch 4; *Legal Profession Act 2007* (Tas) ch 4; *Legal Practitioners Act 1981* (SA) pt 6.
[33] *Legal Profession Uniform Law* s 296 and equivalent provisions in other State and Territory legal profession laws.
[34] *Legal Profession Uniform Law* s 297(1) and equivalent provisions in other State and Territory legal profession laws.

68. The statutory schemes are the principal means by which disciplinary-related matters are raised and dealt with, although they have not replaced the inherent jurisdiction of the Supreme Courts to supervise and discipline their officers.[35] These schemes apply to current and former Australian legal practitioners, and to current and former Australian lawyers.[36]

69. The statutory schemes provide that conduct capable of constituting unsatisfactory professional conduct or professional misconduct includes conduct consisting of a contravention of professional rules.[37] The professional conduct rules for solicitors are, apart from in the Northern Territory, based on the Australian Solicitors' Conduct Rules developed by the Law Council of Australia.[38] The professional conduct rules for barristers are developed by the Australian Bar Association.[39]

70. The regulatory authorities exercising disciplinary powers and functions in each State and Territory are set out below:

Uniform Law jurisdictions (Victoria, NSW and WA)

The Commissioner for Uniform Legal Services Regulation is responsible for developing and making appropriate guidelines to ensure the consistent and effective implementation of the complaint and discipline provisions in Chapter 5 of the *Legal Profession Uniform Law*. The designated local regulatory authorities responsible for handling complaint and disciplinary matters are:

Victoria	Victorian Legal Services Commissioner
New South Wales	Office of the Legal Services Commissioner
Western Australia	Legal Practice Board of Western Australia

Other jurisdictions

In the remaining jurisdictions, the local regulatory authorities responsible for handling complaint and disciplinary matters are:

Queensland	Legal Services Commissioner
Australian Capital Territory	Law Society Council and Bar Association Council
Northern Territory	Law Society Northern Territory
South Australia	Legal Profession Conduct Commissioner
Tasmania	Legal Profession Board of Tasmania

[35] See, eg, *Legal Profession Uniform Law* s 264(1)—Jurisdiction of Supreme Courts—which provides:

> (1) The inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of Australian lawyers are not affected by anything in this Chapter, and extends to Australian legal practitioners whose home jurisdiction is this jurisdiction and to other Australian legal practitioners engaged in legal practice in this jurisdiction.

[36] A person admitted to the legal profession is referred to as an *Australian lawyer.* An Australian lawyer who holds a current practising certificate is referred to as an *Australian legal practitioner*.

[37] See, eg, *Legal Profession Uniform Law* s 298(b) and *Legal Profession Act 2007* (Qld) s 420(1)(a).

[38] See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.* For the Northern Territory see *Rules of Professional Conduct and Practice*.

[39] See *Legal Profession Uniform Conduct (Barristers) Rules 2015*.

Information protection and disclosure

71. As mentioned above, Treasury proposes that a professional association applying to become a prescribed disciplinary body will likely be expected to commit to providing relevant information to the ATO or TPB in relation to circumstances where relevant practitioners may have been involved in significant breaches of Commonwealth laws or other ethics standards.

72. While such a commitment might be sought from fully self-regulating professions, the Law Council considers that such a commitment would be inappropriate for the legal profession regulated under State and Territory laws. Accordingly, the Law Council recommends that Treasury, when seeking to implement the new reforms, consult with the States and Territories (including the Legal Services Council) on matters relating to information protection and disclosure under the legal profession laws.