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**Submission from the Tax Justice Network Australia and the Centre
for International Corporate Tax Accountability and Research on the
*Treasury Laws Amendment (Tax Accountability and Fairness) Bill
2023***

9 February 2024

The Tax Justice Network Australia (TJN-Aus) and the Centre for International Corporate Tax Accountability and Research (CICTAR) welcome the opportunity to make a submission on the *Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023*. We strongly support the passage of Schedules 1 to 4 of the Bill, preferably with minor amendments as outlined below. However, we believe that Schedule 5 should not have been included in a Bill that is otherwise about responding to a PwC partner breaching confidentiality agreements with Treasury and PwC seeking to profit from the breach. We are concerned that Schedule 5 has been added to try and force the hand of those in the Parliament that support Schedules 1 to 4, but believe Schedule 5 should be amended. Issues related to reforms of the Petroleum Resource Rent Tax should be considered separately from reforms responding to the unethical and illegal conduct of PwC partners and staff.

Schedule 1 – PwC response – Promoter penalty law reform

We believe it is important that the ATO has sufficient powers to effectively deter the promotion of tax evasion and avoidance schemes. The penalties for promoting tax evasion and tax avoidance schemes need to be large enough to ensure that a promoter cannot calculate on profiting from having sold tax avoidance and tax evasion schemes when caught. For example, Gregg Ritchie, one of KPMG's senior tax partners in the US, broke the law when he advised his firm not to register a tax shelter with the Internal Revenue Service. In a memo to colleagues, he stated, "Firstly, the financial exposure of the firm is minimal. Based on our analysis of the applicable penalty sections, we conclude that the penalties would be no greater than \$14,000 per \$100,000 in KPMG fees." He also argued it was simply the industry norm "There are no tax products marketed to individuals by our competitors which are registered."¹ He concluded:

Any financial exposure that may be applicable can easily be dealt with by setting up a reserve against fees collected. Given the relatively nominal amount of such potential penalties, the Firm's financial results should not be affected by this decision.... The rewards of successful marketing of [the tax structure] product (and the competitive

¹ Soltes, Eugene. (2016). 'Why they do it', Public Affairs, USA, 90.

disadvantages which may result from registration) far exceed the financial exposure to penalties that may arise.²

Such a calculation must be deterred by Australian law. Thus, we strongly support the maximum penalties proposed in Section 16 of the Bill, where a penalty can be up to three times the total benefit received or receivable or up to 10% of aggregated turnover.

We would urge that the Bill be amended so that the Commissioner can apply to the Federal Court of Australia for an order that an entity has contravened the promoter penalty laws within ten years from the time the conduct that is alleged to have contravened the laws is last engaged in, an increase on the six years currently in the Bill. Such a time frame would increase the deterrent impact of the law.

We strongly support that a scheme is considered a tax exploitation scheme, whether implemented or not.

Schedule 2 – PwC response – Extending tax whistleblower protections

We believe it is important that whistleblowers can provide information to the Tax Practitioners Board to assist it to perform its functions under the *Tax Agent Services Act 2009*. Thus, we support the passage of Schedule 2 of the Bill.

There should be an additional amendment to Section 14ZZX to expand the scope of the protection from any criminal, civil or administrative liability to the recipient entities who assist disclosers in their professional capacity and legal practitioners in receipt of a protected disclosure for the purposes of providing legal advice or legal representation.

Schedule 3 – PwC response – Tax Practitioners Board reform.

The TJN-Aus and CICTAR support Schedule 3 of the Bill. Publishing information about investigations on the register provides a further deterrent to those that would breach the TAS Act, including the Code of Professional Conduct. The public disclosure of the information allows those seeking tax services to be aware of any previous misconduct by a tax agent service. The threat of loss of customers through such publication should lead to a deterrent effect.

We are supportive of the TPB having discretion over how long information will remain on the register, which increases its ability to encourage compliance from entities under its jurisdiction as well as provide information that is in the public interest.

Investigations into complex matters, such as the behaviour of tax agent services, can be time-consuming. The complexity and time taken are likely to be greater for a large firm where multiple people may have been involved in the conduct and where the firm or those involved seek to obstruct the TPB investigation. Therefore, we strongly support the TPB having a default 24 months to conduct an investigation before needing an extension.

Outside of the Bill, we believe that, at the moment, the effectiveness of the TPB is constrained by the board of the TPB needing to be too involved in approving the application of sanctions. We believe that as part of the necessary reforms, appropriate staff within the TPB should be able to impose sanctions without the board's approval, especially if the proposed reforms to widen the sanctions options of the TPB are implemented. Criminological research has demonstrated that deterrence is best served when a sanction is imposed swiftly after detecting the breach. Thus, appropriately reducing administrative 'friction' in imposing sanctions will increase the deterrent effectiveness of the TPB.

² Ibid., 90.

Schedule 4 – PwC response – Information Sharing

TJN-Aus and CICTAR are supportive of Schedule 4 of the Bill. We believe it is vital that taxation officers and TPB officials are able to share protected information with Treasury about misconduct arising out of suspected breaches of confidence by intermediaries engaging with the Commonwealth. Such information sharing will assist with ensuring that illegal activities are more likely to be dealt with. It also removes secrecy requirements as an excuse for an enforcement agency to not deal appropriately with illegal activity and misconduct. We support that Treasury can on-disclose protected information to the Minister or Finance Minister in relation to a breach or suspected breach and any proposed measure or action directed at dealing with such a breach or suspected breach. We believe that Treasury, the Minister or Finance Minister should be able to on-disclose the information to any relevant law enforcement agency, such as the Australian Federal Police, where the misconduct arising out of suspected breaches of confidence by intermediaries is illegal, such as violating a confidentiality agreement. We assume such an option is already available and, therefore, not needed in the Bill.

We also support that taxation officers and TPB officials will be allowed to share protected information with prescribed professional associations to enable them to perform their disciplinary functions.

Schedule 5 – Petroleum resource rent tax deductions cap

As noted in our opening paragraph, we believe that Schedule 5 does not belong in the Bill and should have been brought forward in a stand alone Bill.

Research and analysis by the Tax Justice Network - Australia which highlighted the failure of the PRRT to collect any revenues from Australia's booming offshore gas industry led then Treasurer Scott Morrison, to call for a Review of the PRRT led by Michael Callaghan in 2016. Despite the PRRT Review confirming the current and future failure to collect revenue from new offshore gas projects, the industry persuaded the government to take minimal action due to trumped-up concerns of "sovereign risk" and empty threats concerning future investment by multinational oil giants.

The changes proposed in Schedule 5 are highly inadequate. Rod Sims argued that at a minimum the revenue achieved from reform to the PRRT should have been at least three times higher than the measure in Schedule 5 will raise.³ Mr Sims made the very modest proposal that "when the current year profits are above a certain level, then only, say, two thirds can benefit from the carry forward of past losses, and the remaining third is subject to PRRT without the uplift."⁴

Instead of the proposal in Schedule 5, we would urge the Committee to recommend: urges the Inquiry to advocate for:

- a minor regulatory change in the gas transfer pricing mechanism in the Petroleum Resource Rent Tax (PRRT) that would increase revenue by \$90 billion; and,
- level the playing field for all oil and gas projects and raise \$3 billion per year by introducing a 10% commonwealth royalty on all offshore gas projects that are only subject to the PRRT.

Years after the Government's Callaghan review into the PRRT, Treasury concluded a consultation into the gas transfer pricing mechanism in the PRRT. A small and reasonable regulatory change would raise \$90 billion in additional PRRT revenues according to an estimate in the Callaghan PRRT review. As the PRRT is a profit-based royalty regime, is

³ Rod Sims, "Budget Forum 2023: Labor Could and Should Have Gone Stronger on the Petroleum Resource Rent Tax", *Austaxpolicy: Tax and Transfer Policy Blog*, 12 May 2023.

⁴ *Ibid.*

much easier for companies to shift profits to reduce tax payments. The PRRT applies to the raw gas, for which there is no external market, and not to the LNG, which is manufactured and processed for export under long-term contracts.

Large LNG projects have typically been integrated projects where the same company (or group of companies in a particular project) extracts the gas and processes it into LNG. The PRRT is applied when the raw gas is transferred for processing. Currently, the PRRT allows companies to choose from a range of options in determining the “transfer price” at which point the PRRT is applied. Conveniently, the companies can calculate this price on the basis that the natural resource, owned by the people of Australia, has little value and that the value is created through the manufacturing process. In this case, a low price for the raw gas results in much lower PRRT revenues. The standard method for determining the “gas transfer price” must be restricted a net-back only approach, which is a global best practice and already part of the current methodology.

A net-back only approach would simplify regulations and increase transparency. There should only be one set of regulations based on global best practices. The net-back only method should immediately apply to all LNG projects that are subject to the PRRT. There is an easy \$90 billion on the table that will otherwise be shifted offshore by multinational oil and gas corporations defending the overly generous status quo.

The adoption of the net-back only approach was recommended by Treasury at a meeting on 10 March 2023.⁵ Treasury assessed that that the current residual pricing mechanism under-prices gas.⁶ Further, the under-pricing of the gas occurs because the residual pricing mechanism was conceived on flawed analysis.⁷ Treasury assessed that the Arthur Andersen analysis of the residual pricing mechanism was based on commercially unrealistic assumptions. In their view, “A particularly unrealistic outcome of the RPM is that the upstream part of the business bears all of the project losses in the event of low LNG prices but receives only half of the upside profits when LNG prices are high.”⁸ Further, the “approach directly contradicts the guidance provided by the OECD on the application of the transactional profit split.”⁹ Treasury concluded that:¹⁰

The lack of any sensible rationale for the asymmetric treatment of notional losses in the RPM undermines the Arthur Andersen arguments that it is an equitable mechanism to determine an arm’s length price for sales gas.

The argument that any changes would threaten future investments and create “sovereign risk” is purely a scare tactic and one that the oil and gas industry attempts to use worldwide. The only sovereign risk is that Australia will continue to generate little or no government revenue from the boom in LNG exports while rising domestic energy prices decimate local businesses. The PRRT has been changed many times – for the benefit of the industry – and none of these changes were labelled as “sovereign risk”.

While an additional \$90 billion in revenue is considerable revenue from a minor regulatory change, it is relatively insignificant in terms of the current volume of LNG exports. The \$90 billion is the equivalent of \$3.3 billion in additional revenue per year from 2023 to 2050. LNG

⁵ Senator the Hon Katy Gallagher, “Response to the Senate Order for the Production of Documents No. 246 – Petroleum Resource Rent Tax”, 19 July 2023.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

exports skyrocketed to \$92.8 billion in 2022.¹¹ The PRRT applies a tax rate of 40% of profits from the sale of the raw gas, but the flaws in the PRRT system have generated hundreds of billions of PRRT tax credits that will buffer any PRRT payments for decades to come. Some projects may never pay any PRRT.

The shift to a net-back only approach as the default method for determining a gas transfer price in the PRRT should be implemented immediately and apply to all current and future projects that are subject to the PRRT.

A new 10% royalty should be introduced on existing and future offshore LNG projects, which are only subject to the PRRT. This would level the playing field for all oil and gas projects, including all onshore projects and the North West Shelf Project, which are already subject to royalties of 10% or higher. A reformed PRRT and the associated credits could be kept in place and provide possible revenue in the future if or when existing PRRT credits are exhausted. A 10% royalty would guarantee revenue up front so that Australia is not giving away natural resources to large multinational corporations for free. Estimates suggest a 10% royalty would raise \$2.8 billion in revenue per year and continue to offer a highly competitive fiscal environment for the industry by global standards.

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¹¹ Angela MacDonald Smith, "LNG revenue hits \$92.8 billion as exporters cash in", *The Australian Financial Review*, 5 January 2023.

Background on the Tax Justice Network Australia

The Tax Justice Network (TJN) is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network believes our tax and financial systems are our most powerful tools for creating a just society that gives equal weight to the needs of everyone. But under pressure from corporate giants and the super-rich, our governments have programmed these systems to prioritise the wealthiest over everybody else, wiring financial secrecy and tax havens into the core of our global economy. This fuels inequality, fosters corruption and undermines democracy. We work to repair these injustices by inspiring and equipping people and governments to reprogram their tax and financial systems.

The Tax Justice Network Australia (TJN-Aus) is the Australian arm of TJN.

In Australia, the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Anglican Overseas Aid
- Australian Council for International Development (ACFID)
- Australian Council of Social Service (ACOSS)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union (AEU)
- Australian Manufacturing Workers Union (AMWU)
- Australian Nursing & Midwifery Federation (ANMF)
- Australian Services Union (ASU)
- Australian Workers Union, Victorian Branch (AWU)
- Baptist World Aid
- Caritas Australia
- Centre for International Corporate Tax Accountability & Research (CICTAR)
- Community and Public Service Union (CPSU)
- Electrical Trades Union, Victorian Branch (ETU)
- Evatt Foundation
- Friends of the Earth (FoE)
- GetUp!
- Greenpeace Australia Pacific
- International Transport Workers Federation (ITF)
- Jubilee Australia
- Maritime Union of Australia (MUA)
- National Tertiary Education Union (NTEU)
- New South Wales Nurses and Midwives' Association (NSWMWA)
- Oaktree Foundation
- Oxfam Australia
- Publish What You Pay Australia
- Save Our Schools
- SEARCH Foundation
- SJ around the Bay
- TEAR Australia
- The Australia Institute
- Union Aid Abroad – APHEDA
- United Workers' Union (UWU)

- Uniting Church in Australia, Synod of Victoria and Tasmania
- UnitingWorld
- Victorian Trades Hall Council
- World Vision Australia

Background on the Centre for International Corporate Tax Accountability & Research (CICTAR)

CICTAR is a global corporate tax research centre that produces information and analysis to untangle the corporate tax web. The Centre is a collective resource for workers and the wider public to understand how multinational tax policy and practice affects their daily lives. CICTAR's work supports public participation in the tax debate so that everybody can participate in decision-making that affects their communities.

For more information, visit the CICTAR website here: <https://cictar.org/>