The Tax Institute

4 October 2023

Director
Tax Agent Regulation Unit
Personal and Indirect Tax and Charities Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: PwCResponse@treasury.gov.au

Dear Director,

Government Response to PwC – package of reforms

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the bundle of exposure draft legislation, regulations and accompanying explanatory materials that form part of the Government's 'Response to PwC' package (**Reform Package**).

The Reform Package is intended to strengthen the integrity of the tax system, increase certain powers of the Australian Taxation Office (**ATO**) and the Tax Practitioners Board (**TPB**), and strengthen the regulatory frameworks to ensure they are fit for purpose. While the Reform Package has been named by the Government, a Response to PwC, our understanding is that the overarching objectives 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 broadly 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 be measured and proportionate. They should not result in an unduly onerous burden on tax professionals, the vast majority of whom generally do the right thing, and should not inhibit the provision of independent, objective tax advice.

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The Reform Package includes the proposed:

- Tax Practitioners Board (**TPB**) reforms contained in the draft Treasury Laws Amendment (Measures for consultation) Bill 2023: Tax Practitioners Board (**draft TPB Bill**) and draft Tax Agent Services Amendment (Register Information) Regulations 2023 (**draft TPB regulations**);
- reform of the promoter penalty laws contained in the draft Treasury Laws Amendment (Measures for Consultation) Bill 2023: PWC Response—promoter penalty laws reform (**draft promoter penalty Bill**);
- whistleblower protection changes contained in the draft Treasury Laws Amendment (Measures for Consultation) Bill 2023: Extending tax whistleblower protections (**draft whistleblower Bill**) and draft Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Extending tax whistleblower protections (**draft whistleblower regulations**); and
- increase in information sharing powers contained in the draft Treasury Laws Amendment (Measures for Consultation) Bill 2023: PwC response—information sharing (**draft information sharing Bill**).

Our detailed response in respect of each measure contained in the Reform Package 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, on (02) 8223 0058.

Yours faithfully,

Scott Treatt

General Manager,
Tax Policy and Advocacy

Marg Marshall

President

APPENDIX A

We have set out below our detailed comments and observations on the measures contained in the Reform Package for your consideration.

Tax Practitioners Board reforms

Increase in investigation period

Paragraph 60-125(3)(a) of the draft TPB Bill proposes to extend the period of time the TPB has to complete investigations into the potential breach of the *Tax Agent Services Act 2009* (**TASA**) from 6 months to 24 months. Paragraph 1.17 of the draft explanatory memoranda (**EM**) of the draft TPB Bill states that this change:

> '…recognises the shortcomings of mandating a 6-month period. Apart from where the Board was able to justify an extension of the investigation timeframe for reasons outside their control, the 6-month period was insufficient for the TPB to be able to conduct **detailed reviews of complex cases**. Extending the standard investigation timeframe to 24 months will ensure the TPB can address the underlying risks of a case and investigate a wider scope of issues raised by a potential breach.'
>
> [emphasis added]

The Tax Institute recognises that additional time may be needed for the proper investigation of complex cases. We support the reform to allow additional time in this regard. However, this should not become the standard for all matters. Many investigations undertaken by the TPB concern simpler matters that do not require a lengthy period of time to complete. Such matters should continue to be resolved in a timely manner.

Feedback from our members indicates that TPB investigations can be a challenging and stressful time for impacted tax agents, especially if no action is taken at the conclusion of the investigation. A longer investigation period needs to be balanced with the impact on the livelihood and mental health of tax agents, as well as other factors like reputational damage, that can occur and be exacerbated as a result of longer running investigations.

We consider it important for cases to be completed in a timely, reasonable, and efficient manner. There should be a framework which sets out expected timeframes for completion of investigation of matters of certain kinds or complexity. This will provide tax agents with certainty and mitigate the adverse impacts described above. It will also provide transparency and accountability, instilling greater public trust in the TPB and the process.

Oversight into the case management process, such as through independent reviews of complex cases by panels involving external members, can be used to ensure that investigations are undertaken in an efficient manner and can be used to identify and resolve roadblocks in the process. It is also important to ensure that the TPB has access to the needed funding to ensure they have adequate resource to resolve investigations in a reasonable period.

Further, we consider that data surrounding the timing of investigations and case completion should be made publicly available, for example in the TPB's annual report. This will further support the pillars of transparency and accountability.

Unregistered entities in breach of the Tax Agent Services Act 2009

Proposed subsection 60-135(3A) of the draft TPB Bill 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 1.4 of the EM to the draft TPB Bill 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 TPB 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 1.19 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 otherwise been 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.

This 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 were addressed. This improves the overall integrity of the register and provides greater assurance to the public.

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

The overwhelming response from our members has been concern 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 *Tax Administration Act 1953* 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) (*Promoter of tax exploitation scheme*), section 290-60 (Meaning of *promoter*) and section 290-65 (Meaning of *tax exploitation scheme*). It does not explicitly relate to conduct described in subsection 290-50(2) (*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), or where the entity does not know the result of the relevant conduct under subsection 290-55(7).

We consider that it is important for the law to maintain the exception for advice under subsection 290-60(2) 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 guidance should be 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 certainty to practitioners, and assurance to taxpayers that they are able to receive sound advice from their advisers without the latter fearing serious ramifications.

Relevant schemes for the purposes of rulings other than product rulings

Subsection 290-50(1A) of the draft promoter penalty Bill 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.

This extends the scope of the promoter penalty 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]

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1 TAA 1953, subsection 358-5(3) of Schedule 1.

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

Paragraphs 1.42 of the draft EM to the draft promoter Bill 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.'

We note that edited PBRs cannot be relied on by a taxpayer other than the taxpayer to whom the PBR applies. 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.

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, with which conformity could be promoted for the purposes of the promoter penalty rules. It is our view that the law should be clear that it does not capture examples in taxation rulings in this way. Clarity should be provided as to whether this is intended by the proposed law and, in the case of rulings where no scheme is explicitly described, how these provisions may apply, if at all.

Application to employees and in-house advisers

We note the change from receipt of consideration to receipt of a benefit is intended to overcome practical challenges faced by the Commissioner in demonstrating that a promoter or an associate of a promoter received consideration in respect of marketing or encouraging growth or interest in, a tax exploitation scheme.

Generally, a tax adviser will be paid by a taxpayer for their advice on specific matters. However, for in-house employees, this is generally not the case. Advice provided by in-house tax advisers forms part of their employment and is not generally remunerated on an advice-by-advice basis. In this regard, our concern regarding the change from consideration to benefit is the risk that this could capture advice provided by in-house advisers as part of their employment. For example, where an in-house adviser advises the business for which they work on a particular transaction which is undertaken successfully, and the adviser receives a bonus or promotion, that result would be a benefit for the purpose of these rules.

Clarity should be provided around how the rules are intended to operate with respect to in-house advisers, and the parties that are ultimately responsible and potentially liable to penalties under these provisions.

Relevantly, in our view, employees acting under the supervision and direction of senior executives or practitioners (regardless of whether they work in-house or in a firm in private practice) should not be subject to these provisions.

Turnover for calculation of penalties

Subsection 290-50(4A) and (4B) of the draft promoter penalty Bill proposes to calculate the penalty imposed on promoters who are body corporates or significant global entities (**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 particularly 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 for the draft promoter penalty Bill should explain the rationale for this approach.

Whistleblower protection changes

Protection for professional associations

As currently drafted, the draft whistleblower Bill does not afford the relevant protections to professional associations that disclose information originally disclosed to them by their members. 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.

Increase in information sharing powers

Importance of taxpayer confidentiality

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

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

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 taxation and superannuation systems. 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 from completing their investigation into an actual or potential breach of their code of conduct.

Further, it is important that Government release detailed guidelines establishing what constitutes a suspected action that could allow confidential information to be shared to 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. 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.

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.