



THE LAW SOCIETY
OF NEW SOUTH WALES

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28 September 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: nathan.macdonald@lawcouncil.au

Dear Dr Popple,

Proposed measures in response to events involving PwC

The Law Society of NSW appreciates the opportunity to provide input to the Law Council of Australia for its submission to the Treasury consultation on draft exposure legislation in response to events involving PwC. The Law Society's Business Law Committee has contributed to this submission.

Background

We note the Treasury has released for consultation four draft exposure bills to amend taxation legislation to address shortcomings in regulatory frameworks with respect to the tax advice industry that were exposed as a result of the PwC matter. They are designed to:

- expand and increase the tax promoter penalties,
- modernise tax secrecy rules,
- extend whistleblower protections, and
- enhance TPB investigation processes.

In the limited time available, we raise the following issues for consideration.

General Comments

Our general observation is that the draft legislation appears to be a reasonable response to the particular issues that arose out of the PwC matter. The changes proposed in the Information Sharing, Tax Practitioner Board and Whistleblower Bills provide useful safeguards to assist with the striking down of tax avoidance arrangements. We consider the Promoter Penalty Laws Bill, however, may give rise to some ambiguity, as discussed below.

Information Sharing Bill

The proposals to expand the ATO and TPB protected information sharing power to permit disclosure to Treasury and other prescribed bodies would appear reasonable. However, we

consider further clarification is required as to the scope of the Treasury on-disclosure powers and protection of the information shared. Under the new regime, Treasury will be permitted to on-disclose protected information it receives from the ATO and TPB not only to consult with their counterparts in the Department of Finance, ahead of providing advice to the Finance Minister, but also 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*.¹ In our view, prescribing the agencies to which protected information may be on-disclosed, perhaps by way of regulation making power, would address concerns that confidential information is appropriately confined.

Promoter Penalties Bill

The Law Society supports deterring promotion of tax avoidance and tax evasion schemes. While it is plain that the very serious nature and scale of the PwC events demands a response that is of a deterrent effect, caution should be taken to ensure that desirable behaviour is not also deterred. In our view, it is important that taxpayers retain the right to take independent tax advice. This not only assists taxpayers in understanding their obligations, but Treasury is also assisted when taxpayers have the benefit of advice which ensures they comply with the law and pay their tax liabilities.

Higher sanctions, particularly such as those proposed for a significant global entity under the new scheme, may not solely increase deterrence. Faced with severe penalties, some may well be deterred from non-compliance. However, higher sanctions may also induce other previously complying advisers to limit or temper their participation, thereby potentially compromising the independent advice sought. The Law Society acknowledges that the new 10% of aggregated turnover penalty² is designed to deter entities from treating civil penalties as a mere cost of doing business. We also make the observation, in this regard, that the penalty amount will be unrelated to the actual benefit received and may, therefore, appear disproportionate.

We are also concerned that technical breaches, where there is no intention to promote a scheme, may be caught. 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 case. If the decision was later reversed (or a tax avoidance scheme subsequently found to have existed) the question arises whether the dissemination of the information in the first instance would be caught. Notably, marketing material may fall within the new definition of 'benefit'.

Whistleblower Protections Bill

Similar to our comments above regarding the Information Sharing Bill, we are concerned that the Whistleblower Protections Bill creates the potential for very broad dissemination of disclosures with risks to the security of that information. Under the existing regime, only disclosures to legal practitioners fall within the scope of the legislation which provides a clear delineation as to how far the disclosure protection would go.

¹ Para 1.22 of the Explanatory Materials to the Information Sharing Bill (ISB) explains that the existing Treasury on-disclosure powers in section 355-175 of the *Taxation Administration Act 1953* (TAA) and section 70-45 of the *Tax Agent Services Act 2009* (TASA) will apply to the information that the ATO and TPB will be permitted to disclose to Treasury under amendments to the TAA at item 1, ISB and to the TASA at item 4, ISB.

² Item 11, Promoter Penalties Bill.

The much wider scope of the new provisions, which expands the recipients of disclosures to include medical practitioners, psychologists, and trade or industry unions,³ risks the linkage to the disclosure being so remote that the provisions become unwieldy.

If you have any questions about this submission, please contact Sonja Hewison, Policy Lawyer at sonja.hewison@lawsociety.com.au or on (02) 9926 0219.

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The letters are cursive and fluid, with the first letter 'C' being particularly large and prominent.

Cassandra Banks
President

³ Item 4, Whistleblower Protections Bill.