31 March 2023

Senator Jess Walsh
Chair, Senate Standing Committees on Economics

PO Box 6100
Parliament House
Canberra ACT 2600

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

Cc: Laura Berger-Thomson, First Assistant Secretary, Treasury
Michael O'Neill, CEO/Secretary, Tax Practitioners Board

Dear Ms Walsh,

Treasury Laws Amendment (2023 Measures No.1) Bill 2023 – Schedule 3 - Implementation of the Government's response to the Review of the Tax Practitioners Board

The external professional association members[1] of the Tax Practitioners Board (**TPB**) **Tax Practitioner Governance and Standards Forum**[2] (**TPGSF**), collectively the **Joint Bodies**, make this submission in response to the Senate Economics Legislation Committee's (**the Committee**) inquiry into the ***Treasury Laws Amendment (2023 Measures No. 1) Bill 2023*** (**the Bill**), specifically Schedule 3 which relates to proposed changes to the *Tax Agent Services Act 2009* (**TASA**). Additional professional association members[3] from the TPB **Consultative Forum** also support the views presented in this submission.

The Joint Bodies are committed to supporting the reforms progressed from the Review and to provide insights from tax professionals and their clients that ensure the design and implementation of new rules are appropriate and effective.

The complexity and scope of Australia's tax and superannuation system means that almost all Australian businesses and almost two-thirds of individuals use a tax practitioner to help them with their tax affairs. As at 30 June 2022, there were 45,333 tax agents and 17,007 BAS agents[4]. Many of these agents employ others. Collectively, they employ tens of thousands more people to provide tax advice, as well as prepare and lodge the millions of returns and forms required by the ATO each year.

The size and importance of the tax profession means that changes to the regulatory framework need to be properly considered and carefully implemented. The Joint Bodies support the progression of the recommendations arising from the Review of the Tax Practitioners Board (**the Review**) in 2019 and acknowledge the refinement of proposals since the publication of the **Government response** to the Review recommendations.

We also recognise the improvements to the provisions contained in the Bill resulting from Treasury consultation in December 2022 on the **implementation of the Government's response to the Review of the TPB,** including consideration of our **response**. Our following comments seek to inform the Committee of the views of and impacts on the tax profession of the Bill and to provide constructive suggestions for consideration by the Committee to achieve optimal design of the regulatory framework.

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[1] The external members are Chartered Accountants Australia and New Zealand, CPA Australia, Institute of Public Accountants, the Taxation Committee of the Law Council of Australia's Business Law Section, The Tax Institute, Australian Bookkeepers Association, The Institute of Certified Bookkeepers and SMSF Association.
[2] The TPGSF was established pursuant to Recommendation 3.3 of the Final Report of the 2019 **Review of the Tax Practitioners Board** (**the Review**) to ensure that any significant proposals affecting tax practitioners, such as relevant legislation and regulations including the **Code of Professional Conduct** (the Code) in the *Tax Agent Services Act 2009* (TASA), are made with appropriate consultation. See Tax Practitioners Board, **Tax Practitioner Governance and Standards Forum Charter**, 2021
[3] Additional signatories from the Consultative Forum are Institute of Financial Professionals Australia and NTAA Plus.
[4] Tax Practitioners Board, About the Tax Practitioners Board, **Annual Report 2021-22**, 2022

Schedule 3, Part 1 – Obligations relating to the provision of tax agent services

1. Tax agents providing services on behalf of disqualified entities including proposed Code obligation – s30-10(16)

We support the design of the provisions related to the employment or use of the services of disqualified entities. However, we wish to draw the Committee's attention to the provisions that were not included in the Exposure Draft legislation related to arrangements with disqualified entities, including s30-10(16) in the Code of Professional Conduct (the Code).

We support the inclusion of provisions targeting disqualified entities seeking to engage a tax agent to provide tax or BAS agent services on their behalf. However, the newly inserted provisions introduce the unfamiliar concept of tax agent services provided "in connection with an arrangement[5] with a disqualified entity". The breadth of this wording introduces uncertainty, creates interpretative complexity and potentially anomalous, unintended consequences for both the TPB and tax practitioners.

We believe that this wording is so broad that, as drafted, proposed Code item 16 (s 30-10(16)) ostensibly captures services provided by tax practitioners *to their clients* where the client themselves or potentially employees or contractors that they use, fall within the definition of "disqualified entity". We note that due to the definition of "disqualified entity", the entity need not be a tax practitioner in order to be a disqualified entity for the purposes of Code item 16.

Examples include:

- the entity may simply be an individual client with whom the tax practitioner has an engagement to provide tax agent services, where that individual was declared bankrupt within the past 5 years
- a large tax practitioner firm that provides international assignment tax services to a corporate client and as part of this engagement also provides expatriate tax services to and for their employees, where one or more of those employees has been convicted of an offence involving fraud or dishonesty
- a mid-sized tax practitioner firm who provides tax agent services to a corporate client whose employee or contractor in the in-house tax team, who is involved in the provision of the services, has been convicted of a serious offence which may not be tax-related[6].

We do not believe that the law is intended to apply in the above scenarios and circumstances. We also consider that any provision that could have an inhibiting effect on registered practitioners providing tax agent services to the community is undesirable, runs contrary to the objectives of the TASA and would be unintended.

The Code obligations must be principled and clear in their scope and operation. Sanctions for breaches of the Code have serious consequences, such as suspension or termination of registration for an individual and/or an entity agent. Accordingly, we recommend that the wording be tightened and refined.

Our view is that the targeted mischief would be more simply and effectively addressed with provisions based on **section 123** of the Legal Profession Uniform Law which does not require contemplation of an "arrangement" or an "in connection with" nexus but rather simply prohibits the provision of legal services on behalf of a disqualified entity.

See Appendix One for proposed amendments that achieve the intent of the provisions, align with the Legal Profession Uniform Law and properly target the mischief.

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[5] The TASA refers to the ***Income Tax Assessment Act 1997*** definition which is "any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings."

[6] Note - the new definition of a "serious offence" under the TASA is found in s 995-1 of the *Income Tax Assessment Act 1997*, which uses the definition in s 355-70 in Schedule 1 of the *Taxation Administration Act 1953*, which is:

> *"10) **Serious offence** means an offence against an ***Australian** law that is punishable by imprisonment for a period exceeding 12 months."*

2. Object clause and Minister's power to change the Code

The Joint Bodies support continued improvements to the integrity of the tax profession and the TPB's crucial role in this regard. However, the integrity of the tax profession should not be confused with the integrity of the tax system – which remains the responsibility of the ATO. We are concerned that the broad nature of the proposed change to the object clause could reduce, rather than enhance, the independence of the TPB from the ATO, resulting in blended roles for the agencies.

Additionally, giving the Minister power to change the Code by legislative instrument conflates the roles and responsibilities of Ministers and Parliament. As the Code is the centrepiece of the TASA, we consider that it is too important to be capable of change by a single Minister via legislative instrument rather than by our elected representatives, with appropriate legislative scrutiny.

For more detail in relation to our concerns on both changes, please see our previous submission[7] to Treasury on the Exposure Draft legislation.

3. Commencement date of Code obligations

The two proposed Code of Conduct obligations in relation to the future employment or engagement of disqualified entities have a commencement date that applies from the first quarter after Royal Assent.

This means that the commencement date will be a maximum of 3 months, but potentially a minimum of only one day after Royal Assent. Such a short period for tax practitioners to effectively comply with the new Code obligations in respect of newly employed or engaged entities is likely to be insufficient. Even the maximum period of 3 months will be a very tight timeframe to develop and implement the policies, procedures and systems that are necessary to meet the Code obligations.

By contrast, in relation to existing employed or engaged disqualified entities, tax practitioners and the disqualified entities have the benefit of a 12-month transitional period to comply with their obligations. The Bill quite rightly takes into account that tax practitioners and their existing disqualified entities require up to 12 months to allow sufficient time for tax practices and the TPB to gather the relevant information and implement the required approvals for their existing disqualified entities.

However, the Bill does not adequately take this into account for compliance with respect to the onboarding of prospective tax resources.

As this measure is intended to be an important governance and risk management measure to improve the governance of tax practices and the integrity of tax professionals, we believe that a reasonable implementation period is essential to ensure the success and fairness of the measure. Again, sanctions for breaches of the Code have serious consequences, such as suspension or termination of registration.

The Explanatory Memorandum (EM) indicates that the government and TPB have expectations that governance process standards will be lifted:

> "3.36 Tax practitioners are expected to implement new onboarding requirements, information gathering and employee reporting processes to determine whether their staff and people they use are disqualified entities and if notification and approval by the TPB is necessary. This ensures that employees and contractors used by tax practitioners must meet the standards set by the new laws."

In practice, the two new Code obligations will involve checking with the TPB via the online Register, and potentially other sources. It may also require an update to risk management and employment procedures, such as existing pre-employment checklists, declarations by staff and contractors, and letters of engagement.

[7] See pages 4 and 9 of the **Joint Bodies' response to Treasury consultation on Implementation of the Government's response to the Review of the Tax Practitioners Board**, December 2022

Tax practices will also need to consider setting up a process by which they determine whether to apply for approval for, or sever the connection with, disqualified entities, so as to avoid breaching the new Code obligations and the existing civil penalty prohibition (s 50-25 of the TASA).

Tax practitioners may also need to liaise with their human resources department, and/or external employment law experts as relevant, to duly carry out this process.

Therefore, we recommend that the commencement date should be at least the second quarter after Royal Assent. This will allow the TPB to develop and issue guidance on the interpretation of "ought reasonably to know" and will allow practices to implement new verification and disclosure processes in consultation with the profession through the TPGSF.

Schedule 3, Part 2 – Annual registration

4. Move to annual period

Many tax practitioners have expressed their preference for three-year renewal periods and are not supportive of enabling the TPB to set an annual registration period. There are concerns that with increasing conditions attached to registration and renewal, an annual process will be onerous and provide less certainty than the current triennial period.

5. Registration fee changes

In providing the TPB with the ability to change the registration period to annual from 1 July 2024, we recommend that intervening period be used to enhance the TPB's IT systems and design a more streamlined and efficient process. Further clarity will also be required on the transition period and the impact of shifting to annual fees.

Schedule 3, Part 3 – Tax Practitioners Board Special Account

We support the establishment of the TPB Special Account on the condition that there will be no increase in TPB fees.

Additional observations

The effective implementation of the proposed changes requires the TPB to administer the disqualified entities regime including the approvals process, and enforcement of the Code obligations and notification requirements. Further improvements are also required to improve the public register, streamline renewal processes and enhance the governance arrangements for the register. The Government should ensure that the TPB is properly funded to adopt these changes including further investment in staff capability and IT systems.

Given the significant changes resulting from the Bill, consultation on implementation and transitional rules, as well as the production of public advice and guidance, should commence as early as possible.

We would appreciate if the TPB could consider preparing an equivalent of the ATO's **Law Companion Rulings**, such as a TPB Law Companion Guideline on the Bill, that is developed in conjunction with the TPGSF external members. The Guideline would set out the TPB's interpretation of the reforms, and its compliance expectations. This interpretative process should commence now that the Bill has been introduced to Parliament. This would provide sufficient time for it to be released in draft form and finalised once the Bill is passed.

Should you wish to discuss further, please contact Elinor Kasapidis, TPGSF External Co-chair and Senior Manager Tax Policy at CPA Australia, on 0466 675 194 or **elinor.kasapidis@cpaaustralia.com.au** in the first instance.

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Appendix One

Disqualified entities seeking tax agents to provide services on their behalf

The Bill introduces provisions that were not contained in the Explanatory Draft related to tax agents being engaged by disqualified entities to provide tax or BAS agent services on their behalf, also known as the "tame agent" problem. We support the inclusion of a measure to deal with this issue, however the wording of the provisions is challenging.

The relevant provisions (see Table below) contain the following wording:

> "…in connection with an *arrangement"
>
> "…enter into an arrangement in connection with the provision of tax agent services".

This contrasts with the use of the term "on behalf of" in the other disqualified entity provisions that refer to "providing tax agent services **on behalf of** a registered tax agent or BAS agent" (emphasis added). Similarly, the term "on behalf of" is used in section 123 of the Legal Profession Uniform Law[8] which the Review considered an appropriate comparative standard for tax practitioners.

This more direct language assists practitioners to clearly understand that providing services on behalf of disqualified entities is a breach of the Code, rather than being required to interpret "arrangements" and "connections". Alignment with the wording of provisions related to the provision of tax agent services on behalf of registered agents also provides interpretive clarity and consistency.

We therefore recommend the following changes to the affected provisions to better articulate these requirements.

Relevant provisions in the Bill	**Recommended changes**
30-10(16) You must not provide *tax agent services in connection with an *arrangement with an entity that you know, or ought reasonably to know, is a *disqualified entity.	30-10(16) You must not provide *tax agent services on behalf of an entity that you know, or ought reasonably to know, is a *disqualified entity.
45-1 A disqualified entity must give notice to a registered tax agent or BAS agent in relation to being a disqualified entity: (a) when seeking to provide, or providing, tax agent services on the registered tax agent or BAS agent's behalf; or (b) if the entity is seeking to enter an arrangement, or has an arrangement, with the registered tax agent or BAS agent in connection with the provision of tax agent services by the registered tax agent or BAS agent.	45-1 A disqualified entity must give notice to a registered tax agent or BAS agent in relation to being a disqualified entity: (a) when seeking to provide, or providing, tax agent services on the registered tax agent or BAS agent's behalf; or (b) when seeking the provision of tax agent services by the registered tax agent or BAS agent on the entity's behalf.
45-10(2) If: (a) you are a *disqualified entity; and	45-10(2) If: (a) you are a *disqualified entity; and

[8] **LEGAL PROFESSION UNIFORM LAW (NSW) - SECT 123**
Contravention by Australian legal practitioner
Conduct of an Australian legal practitioner who provides legal services **on behalf of** a disqualified entity in the capacity of an associate of the entity is capable of constituting unsatisfactory professional conduct or professional misconduct if the practitioner ought reasonably to have known that the entity is a disqualified entity (emphasis added).

(b) you are seeking to enter into an *arrangement with a *registered tax agent or BAS agent in connection with the provision of tax agent services by the registered tax agent or BAS agent; you must notify the registered tax agent or BAS agent, in writing, that you are a disqualified entity before the registered tax agent or BAS agent: (c) enters into an arrangement with you in connection with the provision of tax agent services by the registered tax agent or BAS agent; or (d) renews such an arrangement; or (e) agrees to extend such an arrangement.	(b) you are seeking the provision of tax agent services by the registered tax agent or BAS agent on your behalf; you must notify the registered tax agent or BAS agent, in writing, that you are a disqualified entity before the registered tax agent or BAS agent provides, renews or agrees to extend tax agent services on your behalf.
45-15(1) If you become a *disqualified entity and: (a) you are providing *tax agent services on behalf of a *registered tax agent or BAS agent; or (b) there is an *arrangement in force between you and a *registered tax agent or BAS agent in connection with the provision of tax agent services by the registered tax agent or BAS agent; you must notify the registered tax agent or BAS agent, in writing, that you are a disqualified entity.	45-15(1) If you become a *disqualified entity and: (a) you are providing *tax agent services on behalf of a *registered tax agent or BAS agent; or (b) a *registered tax agent or BAS agent is providing tax agent services on your behalf; you must notify the registered tax agent or BAS agent, in writing, that you are a disqualified entity.
45-20(2) If: (a) immediately before the day this section commences there is an *arrangement in force between you and a *registered tax agent or BAS agent in connection with the provision of *tax agent services by the registered tax agent or BAS agent; and (b) at the start of the day this section commences you are a *disqualified entity; and (c) immediately before the day that is 12 months after the day this section commences there is an arrangement in force between you and the registered tax agent or BAS agent in connection with the provision of tax agent services by the registered tax agent or BAS agent; and (d) you have not already notified the registered tax agent or BAS agent under section 45 10 or 45 15 that you are a disqualified entity; you must notify the registered tax agent or BAS agent, in writing, that you are a disqualified entity. You must give the notice within 30 days of the day that is 12 months after the day this section commences.	45-20(2) If: (a) immediately before the day this section commences a *registered tax agent or BAS agent is providing *tax agent services on your behalf; and (b) at the start of the day this section commences you are a *disqualified entity; and (c) immediately before the day that is 12 months after the day this section commences the registered tax agent or BAS agent is providing tax agent services on your behalf; and (d) you have not already notified the registered tax agent or BAS agent under section 45 10 or 45 15 that you are a disqualified entity; you must notify the registered tax agent or BAS agent, in writing, that you are a disqualified entity. You must give the notice within 30 days of the day that is 12 months after the day this section commences.