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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (TAXATION AND OTHER MEASURES NO.
1) BILL 2023

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
AAT	Administrative Appeals Tribunal
ATO	Australian Taxation Office
BAS	Business Activity Statement
BAS services	Business activity statement services
Bill	<i>Treasury Laws Amendment (Taxation and Other Measures No. 1) Bill 2023</i>
Commissioner	Commissioner of Taxation
TPB	Tax Practitioners Board
TPB Review	Independent Review of the Tax Practitioners Board
Register	The register established and maintained by the Tax Practitioners Board
TAS Act	<i>Tax Agent Services Act 2009</i>
TAS Regulations	<i>Tax Agent Services Regulations 2022</i>

Chapter 1: Government response to the Review of the Tax Practitioners Board - Tranche 2

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Outline of chapter

- 1.1 This Bill amends the TAS Act to implement recommendations of the final report of the TPB Review. The amendments aim to restore public confidence in the regulation of the tax profession by improving the Register and enhancing the TPB's investigation powers.

Context of amendments

- 1.2 Tax practitioners in Australia are governed by the TPB, which is established under the TAS Act and the TAS Regulations.
- 1.3 Under that legislative framework, the TPB administers the system for registering tax agents and BAS agents (collectively known as 'tax practitioners'). It also decides applications for registration and investigates conduct that may have breached the TAS Act, including the Code of Professional Conduct. Where there has been a breach, the TPB may impose sanctions including orders, suspensions or terminations of registration. These powers enable the TPB to regulate the profession and ensure both potential and current tax practitioners are compliant with the legislative framework.

- 1.4 The Register is a public database of current, and in some cases, former tax practitioners, which is maintained by the TPB. The Register supports the TPB's other functions and is searchable by members of the public who may have an interest in identifying and learning more about tax practitioners. In particular, the Register assists the public who require tax agent services and employers who are seeking to engage tax practitioners to assist them in providing tax agent services. The Register is published on the TPB's website.
- 1.5 An independent review, announced by the Government on 5 March 2019, considered the TPB and the TAS Act. The terms of references for the TPB Review stated it was to consider the suitability and effectiveness of the legislative framework for the TPB within the context of its objectives and "to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct".
- 1.6 A final report of the TPB Review was released on 27 November 2020. The recommendations of the final report of the TPB Review included:
- expanding the details of tax practitioners that are currently included on the Register (recommendation 8.1(a));
 - removing time limits on how long certain information appears on the Register (recommendation 8.1(c)); and
 - removing the six-month timeframe to conduct an investigation (recommendation 6.2(c)).
- 1.7 It is responses to the above recommendations which are now being implemented as a second tranche of amendments to the TAS Act. The amendments contained in this Bill follow an initial tranche of amendments to the TAS Act, which form Schedule 3 of the *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023*. The amendments in this Bill are introduced within the context of recent parliamentary and public scrutiny of disreputable tax practitioner conduct in Australia. Further amendments to the TAS Act are expected to follow the introduction of this Bill also intended to promote the professional and ethical standards of tax practitioners.
- 1.8 References to disqualified entity provisions in this Explanatory Memorandum are subject to the passage of the *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023*, which is currently before Parliament for consideration.

Detailed explanation of new law

- 1.9 The amendments in this Bill are the next tranche of amendments to the TAS Act implementing recommendations from the TPB Review. They demonstrate the Government's commitment to restoring public confidence in the regulation of the tax profession. The amendments provide greater transparency to the

public on the misconduct of tax professionals and enable the TPB to conduct more fulsome investigations where they suspect there has been a breach of the TAS Act.

1.10 The main changes under the amendments include:

- section 60-125 and section 60-135 of the TAS Act are updated to improve the quality and usefulness of the Register to better assist members of the public;
- paragraph 60-125(3)(a) is updated to extend the standard timeframe in which TPB investigations can be conducted; and
- section 70-30 is updated to clarify and better target the TPB's delegation powers.

Information on the Register

1.11 Part 1 to the Bill amends section 60-135 and requires additional information to be published on the Register. The Register records the details of both registered and formerly registered entities. The additional information is made available to the public to help inform their decisions about tax practitioners. Members of the public are able to search the Register for useful information about tax practitioners prior to engaging them for tax agent services. In this way, the additional information enhances transparency and contributes to the restoration of public confidence in the tax profession and its regulation.

1.12 This amendment states it is the TPB's obligation to establish and maintain the Register in accordance with the TAS Act and TAS Regulations. The TAS Regulations set out the specific items that must be published about different entities. For completeness, 'entity' is defined at subsection 960-100(1) in the *Income Tax Assessment Act 1997* to include individuals, body corporates, and partnerships.

[Item 1, subsection 60-135(1) of the TAS Act]

1.13 A key function of the Register is the display of all tax practitioners who are currently registered and able to provide tax agent services to the public. Each tax practitioner has a record on the Register and this information remains publicly available for the entire period of their registration.

[Item 1, subsection 60-135(2) of the TAS Act]

1.14 Further to the information specified in the TAS Act about registered tax practitioners, the TAS Regulations can prescribe additional information to be kept on the Register about both registered and not registered tax agents or BAS agents. Where this information is published, the TAS Regulations will also specify the timeframe for which the information must remain on the Register. This amendment allows for a greater breadth of information to be published on the Register, which is accessible to the public. This will increase awareness of potential misconduct and inform decision-making about whether to engage a

tax practitioner.

[Item 1, subsection 60-135(3) of the TAS Act]

- 1.15 Although regulations are also permitted to be made in relation to an entity that is not a registered tax agent or BAS agent, these entities must not be entered or remain on the Register unless this is done consistently with a requirement under the TAS Act or TAS Regulations. If such information is incorrectly published on the Register, then it must be removed by the TPB.

[Item 1, subsection 60-135(3A) of the TAS Act]

Investigations by the Board

Period for making decisions

- 1.16 This amendment extends the period of time that the TPB has in which to conclude investigations into potential breaches of the TAS Act from 6 months to 24 months. This timeframe can still be extended further if the Board is satisfied that for reasons beyond their control, a decision cannot be made in 24 months.

[Item 3, paragraph 60-125(3)(a) of the TAS Act]

- 1.17 The extension of the time given to conclude investigations 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.

Publishing results of investigations

- 1.18 In addition to the extension of the investigation timeframe, this amendment creates a new option for the TPB following the conclusion of an investigation, by allowing the TPB not to pursue administrative sanctions or civil penalties, and instead to publish the findings of the investigation on the Register. When a TPB investigation finds that conduct has breached the TAS Act, they must either decide to take no further action, or take one or more of the following actions:

- impose one or more sanctions.
- terminate an entity's registration.
- apply to the Federal Court for an order to pay a pecuniary penalty.
- apply to the Federal Court for an injunction.

- decide that specific details about a **contravening entity**, defined as an entity engaged in the misconduct, must be published on the Register in accordance with the TAS Regulations.

[Item 5, paragraph 60-125(2)(b)(v) of the TAS Act]

- 1.19 The ability to publish findings of an investigation on the Register has been added as scenarios may arise where there has been a breach of the TAS Act, but pursuing sanctions is not a reasonable course of action. In particular, this can occur where entities were registered at the time the investigation commenced, but had their registration expire without renewal before the conclusion of the investigation. In these circumstances, publishing findings of misconduct from investigations provides the TPB with an additional option to ensure the public is aware of the entity's misconduct.
- 1.20 This also aligns with the disqualified entity provisions contained in Schedule 3 of the *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023*, where entities will be considered a disqualified entity if they are subject to an investigation in the last 5 years that found they breached the TAS Act. Currently, employers of tax practitioners will have to determine this information through their own inquiries. Publishing this information will go towards assisting employers with their obligations under the disqualified entity provisions, whilst still balancing that not all investigation findings are sufficiently serious to be published on a public register. Members of the public who are seeking to engage a tax practitioner will also benefit from this amendment.
- 1.21 A minor editorial amendment is made to the note at the end of subsection 60-125(2) to accommodate the addition of a second note.
[Item 6, subsection 60-125(2) of the TAS Act]
- 1.22 A second note is added at the end of subsection 60-125(2) to identify the register referred to in that subsection is the Register kept under section 60-135 of the TAS Act.
[Item 7, subsection 60-125(2) of the TAS Act]
- 1.23 This amendment affirms that where the decision is made by the Board to publish findings of an investigation where there has been misconduct, the outcome is that the relevant details of the contravening entity must be entered on the Register in accordance with the TAS Regulations.
[Item 8, section 60-125(2A) of the TAS Act]
- 1.24 The amendment introduces a definition of the term '**register**', which is referred to in section 60-125 of the TAS Act. The term is defined as being the register kept under section 60-135 of the TAS Act.
[Item 9, subsection 60-125(10) of TAS Act]

Administrative Review

- 1.25 The decision to publish findings of investigations on the Register can be appealed to the AAT. This is consistent with the availability of administrative review for the TPB's decision to pursue administrative sanctions or civil penalties, following an investigation that finds there has been conduct breaching the TAS Act. Enabling merits review for a TPB decision allows those that are subject to investigations an avenue for appeal with an independent tribunal that can provide a determination on whether the correct decision was initially made.
[Item 10, subsection 70-10(ha) of the TAS Act]

Delegations

- 1.26 Part 3 to the Bill clarifies the operation of section 70-30 permitting delegation by the Board and enables the decision to terminate registration due to death or surrender to be delegated widely to ensure more timely decision-making and better use of the TPB's resources.
- 1.27 A new subheading is added before subsection 70-30(1A) to clarify that this provision refers to functions and powers that are not delegable.
[Item 13, before subsection 70-30(1A) of the TAS Act]
- 1.28 This amendment clarifies the delegation process that applies specifically to **reviewable decisions** by the Board, refers to where an application for merits review may be made to the AAT under section 70-10 of the TAS Act.
[Item 15, subsection 70-30(5) of the TAS Act]
- 1.29 In line with the current operation of the Board, this amendment notes that most reviewable decisions can only be delegated to a committee if it has 3 or more Board members. This recognises that reviewable decisions can have significant impacts on a tax practitioner, and as such, should be carefully considered by a sufficiently qualified committee.
[Item 14, subsection 70-30(2) of the TAS Act]
- 1.30 The only exceptions to this rule for reviewable decisions are the decisions to terminate the registration of an individual, partnership or company as a result of surrender, an individual's death or a company ceasing to exist. These decisions can be delegated to a Board member, committee of any composition, APS employee made available to the Board or a person engaged by the Board.
[Item 14, subsection 70-30(2A) of the TAS Act]
- 1.31 Although these decisions are reviewable, they are largely straightforward decisions with minimal discretion involved. The ability to delegate these further than a specific committee will allow the Board to increase efficiency in decision-making and create space for committees to have sufficient time to devote to more complex decisions requiring their expertise. Where there is discretion in these decisions, the Board will exercise their judgement in regard

to whether this is a decision that can be delegated to another person or body in the TPB, or if it should be made by the Board.

- 1.32 Nonetheless, all decisions to terminate, in particular surrender of registration that may be subject to the TPB's discretion under subsections 40-5(3), 40-10(2A) and 40-15(2A), continue to be subject to merits review by the AAT.
- 1.33 For the avoidance of doubt, decisions made by the Board under subsections 40-5(2), 40-10(2) or 40-15(2) are treated the same as decisions that are not subject to review by the AAT, in that they can be delegated to any person or body mentioned in paragraphs 70-30(1)(a), (b), (c) or (d) including a committee that does not meet the requirements set out in paragraph 70-30(2)(b) of the TAS Act.

Commencement, application and transitional provisions

- 1.34 The Bill commences on 1 July 2024 or the first 1 January, 1 April, 1 July or 1 October after the Bill receives Royal Assent, whichever occurs later.
- 1.35 The Bill will apply at the same time as commencement, except where any of the following provisions apply.

Application and transition of information on the Register

- 1.36 The transitional provision clarifies that the Register as established and maintained prior to commencement of this Bill, is taken to have been established for the purposes of subsection 60-135(1) of the TAS Act, as amended by Part 1 of the Bill.
[Item 2(1), transitional provision]
- 1.37 Regulations made after commencement of this Bill that require certain details of a current or former tax practitioner to be published on the Register, can include information about the entity that may have occurred prior to commencement of this Bill.
[Item 2(2), application provision]

Application of extended investigation timeframe

- 1.38 The amendment extending the standard timeframe in which the TPB may conduct an investigation to 24 months is to apply to investigations conducted by the TPB under section 60-95 of the TAS Act which start:
- on or after the commencement of the Bill; or

- prior to the commencement of the Bill where:
 - the Board had not yet made a decision or advised the entity of the decision under subsection 60-125(2); and
 - the Board had either not determined that a longer period was needed to make a decision under subsection 60-125(4) or had extended the investigation to a period of less than 24 months.
[Items 4(1) and (2), application provision]

1.39 Practically, the TPB will have a standard timeframe of 24 months for new investigations and any existing investigations where a decision is yet to be made. Additionally, investigations which began up to 6 months before commencement, have not had their timeframes extended or been finalised at commencement will have their timeframe extended for an additional 18 months, and will still be subject to the Board’s capacity to further extend the timeframe for circumstances beyond their control.

1.40 If an investigation’s timeframe was extended to less than 24 months prior to commencement, the amendments will disregard the original determination by the Board to extend the investigation’s timeframe. However, the Board cannot extend the timeframe again under subsection 60-125(4). The standard 24 months investigation timeframe will therefore apply to all these investigations.
[Item 4(3), application provision]

1.41 Alternatively, where the Board has determined that a period longer than 24 months was needed for an investigation before commencement of the Bill, this period will not be impacted by the 24-month timeframe and a decision must be delivered within the longer period determined prior to commencement.

Application of decision to publish investigation findings

1.42 The Board has the option to publish specific details of contravening entities on the Register, following an investigation finding of conduct that breaches the TAS Act.

1.43 These amendments are to apply to investigations conducted by the TPB under section 60-95 of the TAS Act which started:

- on or after the commencement of the Bill; or
- on or after 1 July 2022, and before commencement of the Bill where:
 - the Board had not yet made a decision or advised the entity of the decision under subsection 60-125(2); or
[Items 11(1) and (2), application provision]
- before commencement of the Bill where:
 - the Board had found that the entity breached the TAS Act;

- the Board made a decision on or after 1 July 2022 but before commencement of the Bill that no further action would be taken under paragraph 60-125(2)(a); and
- the contravening entity ceased to be a tax practitioner at the time the decision was made.

[Item 12(1), application provision]

1.44 In other words, the Board is able to make this decision for any new investigations, which start on or after commencement of this Bill, or existing investigations, which started between 1 July 2022 and before commencement, where a finding or decision was not made before commencement. For new investigations, the TAS Regulations may prescribe that information which occurred prior to commencement and a timeframe that started prior to commencement, will apply for these decisions.

[Item 11(3), application provision]

1.45 Where the Board decided to take no further action between 1 July 2022 and commencement because the entity was previously registered but was not registered at the time the decision was made, the Board is able to make a new decision to publish findings. The Board has six months from commencement to remake these decisions and publish the details on the Register in accordance with the Regulations.

[Item 12(2), application provision]

1.46 If the Board remakes an original no further action decision and instead decides to publish findings on the Register (a ***publication decision***) then this decision is taken to have been valid irrespective of subsection 60-125(3) of the TAS Act which imposes time limits on decision making and the Board's original decision to take no further action is disregarded. These publication decisions will be displayed on the Register for five years starting from the date of the original decision. This is to ensure equity and prevent investigations that concluded prior to commencement from being on the Register for over five years from the original decision.

[Item 12(3), application provision]

1.47 For a publication decision made after commencement relating to investigations where a no further action decision was made on or after 1 July 2022, the Board will be required to follow the notification process outlined at subsection 60-125(8). Entities will then have the option to pursue merits review with the AAT under subsection 70-10(ha) of the TAS Act.