

2022–2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

[HOUSE OF REPRESENTATIVES/SENATE]

TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2023: PWC RESPONSE: INFORMATION SHARING

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.

Treasury and the ATO work closely to identify aspects of new tax laws which may benefit from ATO public advice and guidance (PAG). Feedback is also sought on any aspects of the new law where ATO PAG should be considered, to support stakeholders' understanding and application of the new law. Stakeholder feedback on this question will be shared with the ATO.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

<i>Abbreviation</i>	<i>Definition</i>
ATO	Australian Taxation Office
Guide to Framing Commonwealth Offences	The Attorney-General's Department's A Guide to Framing Commonwealth Offences, Infringements Notices and Enforcement Powers, September 2011 edition
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
TAA	<i>Taxation Administration Act 1953</i>
TASA	<i>Tax Agent Services Act 2009</i>
TPB	Tax Practitioners Board

Chapter 1: PwC response: Information sharing

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Outline of chapter

- 1.1 Schedule # to the Bill amends the TAA and the TASA to deliver part of the Government’s response to the breach of confidence and unethical use of confidential information by PwC. The amendments will allow taxation officers and TPB officials to share protected information with Treasury about misconduct arising out of suspected breaches of confidence by intermediaries engaging with the Commonwealth. Taxation officers and TPB officials will also be allowed to share protected information with prescribed professional associations to enable them to perform their disciplinary functions.

Context of amendments

- 1.2 In August 2023, the Government announced a package of reforms in response to tax adviser misconduct in Australia, to ensure that tax advice is provided in accordance with appropriate professional and ethical standards. The PwC tax leaks scandal has shown that the current secrecy provisions prevented collaboration and coordination within government to respond to misconduct by large consulting, accounting and auditing firms who engage with the Commonwealth.
- 1.3 The package of reforms included:
- removing limitations in the tax secrecy laws that were a barrier to regulators acting in response to PwC’s breach of confidence; and
 - enabling the ATO and TPB to refer ethical misconduct by advisers (including but not limited to confidentiality breaches) to professional associations for disciplinary action.
- 1.4 Schedule # to the Bill implements these objectives through legislative changes to the secrecy provisions in the TAA and the TASA.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
The ATO and TPB can share protected information with Treasury about misconduct arising out of suspected breaches of confidence by intermediaries engaging with the Commonwealth.	The ATO and TPB <i>cannot</i> share protected information with Treasury about misconduct arising out of suspected breaches of confidence by intermediaries engaging with the Commonwealth.
The ATO and TPB can share protected information with prescribed disciplinary bodies where they reasonably believe a person’s actions may constitute a breach of the prescribed disciplinary body’s code of conduct or professional standards.	The ATO and TPB can share protected information with a professional association in relation to suspected misconduct by members only where such disclosures relate to the administration of the taxation law (an existing disclosure exception).
The 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	No equivalent.

New law	Current law
directed at dealing with such a breach or suspected breach.	

Detailed explanation of new law

Increasing the power of the regulators

- 1.5 To maintain the privacy and confidence of entities interacting with the tax system, and to ensure the maintenance of high levels of voluntary compliance with the tax laws, the secrecy provisions in the taxation laws impose strict obligations on those who receive information under a taxation law. The disclosure of information about the tax affairs of a particular entity is prohibited, except in certain specified circumstances as detailed in Division 355 in Schedule 1 to the TAA and Subdivision 70-E of the TASA.
- 1.6 Previously, there was no general principle that would allow disclosure to relevant professional disciplinary bodies simply because the ATO or TPB had evidence of legal or ethical misconduct by members of the relevant body.
- 1.7 The PwC tax leaks scandal exposed limitations on the power of the regulators to respond to misconduct by tax advisers and firms. It highlighted that current secrecy provisions prevent government agencies from communicating effectively with one another in order to maintain the integrity of the tax system, as well as the process by which Government consults intermediaries. In the PwC scandal the ATO became aware that PwC had breached an obligation of confidence to the Commonwealth and used that information to develop schemes to avoid the application of the proposed law. The ATO was not able to share the relevant information with Treasury.
- 1.8 The amendments will assist the Commonwealth in identifying and pursuing suspected breaches of confidence and act as a deterrent to future misconduct by intermediaries engaging with Commonwealth. Treasury will have the relevant information to lead responses on behalf of the Commonwealth to breaches or suspected breaches and professional associations who have responsibility to regulate their specific profession will have the relevant information to undertake disciplinary actions.
- 1.9 Section 355-15 of Division 355 of Schedule 1 to the TAA specifies that Division 355 applies in the same way as it does to ‘taxation officer’ to individuals who are appointed by the Commonwealth and perform functions or exercise powers under or for the purposes of a ‘taxation law’ (which, as defined under the ITAA 1997, includes the TASA). Taxation officer, therefore, includes the TPB Chair, TPB Board members and TPB staff.

- 1.10 TPB staff are APS employees employed by the ATO and whose services are made available to the TPB. In this explanatory memorandum, the term ‘TPB official’ is used instead of ‘taxation officer’ to avoid confusion between the employees that work at the ATO and those that work at the TPB.
- 1.11 The type of information that is subject to such strict obligations is known as ‘protected information’ under the TAA (section 355-30) and ‘official information’ under the TASA (section 90-1). Despite differing terminology, both have the same meaning – they refer to information disclosed or obtained under their relevant acts, which relate to the affairs of a person, and identify, or can reasonably identify the person to whom that information belongs. In this explanatory memorandum, the term ‘protected information’ is used in reference to both Acts for brevity.

Information sharing with the Treasury

- 1.12 Schedule # to the Bill amends the TAA to allow taxation officers to share protected information with the Secretary of the Treasury Department where certain criteria are met:
- There is a breach or suspected breach of an obligation of confidence by an entity against the Commonwealth or a Commonwealth entity;
 - The entity was, at the time the obligation first arose, providing advice to a Commonwealth entity either as an entity engaged by the Commonwealth entity for that purpose, or as an entity representing a taxpayer;
 - The sharing of the protected information is for the purpose of enabling or assisting in the consideration, development or implementation of any measure, or the taking of any action, directed at dealing with the breach or suspected breach.

[Schedule #, item 1, table item 14 of the table in subsection 355-65(8) in Schedule 1 to the TAA]

- 1.13 The advice provided by an entity may have been as a service provider or as a taxpayer representative and was provided by means other than by public consultation. This could include but is not limited to private consultations, working groups and roundtables, where individuals were required to sign non-disclosure agreements, privacy agreements, or other such agreements with any Commonwealth department, agency, and body to ensure integrity and confidentiality in the policy development process.
- 1.14 The criteria for a record or disclosure relating to the purpose for Treasury developing and implementing an appropriate measure on behalf of the Commonwealth is that this purpose can be interpreted to include a number of activities. For example, the Treasury may develop measures that are broader than directly addressing the breach (for example, the amendments in this

Schedule are broader than specifically responding to the PwC breach) or may take action directed at dealing with the specific breach or suspected breach. We do not wish to limit Treasury's options when investigating a potential breach of confidence.

- 1.15 Schedule # to the Bill amends the TASA to allow TPB officials to share protected information with the Secretary of the Treasury Department for the same purposes.
[Schedule #, item 4, section 70-40 of the TASA]

On-disclosure of information to the relevant Ministers

- 1.16 Under the tax secrecy provisions in the TAA, someone who is not a taxation officer is prohibited from disclosing protected information except in certain circumstances. Under the secrecy provisions in the TASA, someone who is not a TPB official is prohibited from disclosing protected information except in certain circumstances.
- 1.17 The amendments introduce a new exception in the TAA to allow the disclosure of protected information obtained by the Treasury with the Minister and Finance Minister for the purpose of Treasury developing and implementing an appropriate response on behalf of the Commonwealth to a suspected breach of confidence by those providing advice to the Commonwealth, either as service providers to Commonwealth or representing taxpayers in their interactions with the Commonwealth.
[Schedule #, item 2, section 355-181 of Schedule 1 to the TAA]
- 1.18 Similarly, the amendments to the TASA to allow the disclosure of protected information obtained by the Treasury for this same purpose. Due to the legislative framework of the TASA a new distinct on-disclosure exception is not required. The information sharing exception that will allow TPB officials to share official information with Treasury includes sharing that information for the purpose of enabling or assisting the Secretary or an SES employee of the Department to advise the Minister and the Finance Minister in relation to the breach or suspected breach. Under the TASA, the sharing of the information from Treasury to Ministers is in line with the 'original purpose' exception (see section 70-45(4)).
[Schedule #, item 4, subparagraph 70-40(5)(d)(ii) of the TASA]
- 1.19 This is intended to ensure that Treasury officials may advise the relevant Ministers about a breach, or suspected breach, of an obligation of confidence against the Commonwealth or a Commonwealth entity. This includes any proposed measure or action directed at dealing with such a breach or suspected breach.

- 1.20 As this provision is an exception to the offences in section 355-155 of the TAA and subsection 70-35(1) of the TASAs, the evidential burden of proof is reversed in this instance.
- 1.21 A consequential amendment is made to reference the new exception in section 355-320 of the TAA to ensure that the existing limits on on-disclosure to Ministers applies to this new exception.
[Schedule #, item 3, section 355-120 of Schedule 1 to the TAA]
- 1.22 Treasury officials are already able to consult with their counterparts in the Department of Finance, ahead of providing advice to the Finance Minister, under the existing ‘original purpose’ on-disclosure exception in section 355-175 of the TAA and section 70-45 of the TASA. The ‘original purpose’ on-disclosure exception also allows Treasury on-disclosing protected information in other circumstances such as:
- to seek legal advice about a course of action to respond to the breach or suspected breach;
 - to consult with other agencies in relation to the work on a proposed response.

Information sharing with professional disciplinary bodies

- 1.23 Previously, there was no general principle that would allow disclosure to relevant professional disciplinary bodies simply because the ATO or TPB had evidence of legal or ethical misconduct by members of the relevant body. The limited situations were only where disclosure would fall under existing disclosure exceptions (e.g. the performance of duties exception). This prevented professional associations from receiving information which may have enabled them to pursue disciplinary actions against their members where they were not otherwise aware of the behaviour. This inhibits the proper operation of the dual self-regulatory model that exists in many professions.
- 1.24 Schedule # to the Bill amends the TAA to provide that a taxation officer may disclose protected information in relation to acts or omissions by a person to a prescribed professional disciplinary body where the taxation officer reasonably suspects acts or omissions may constitute a breach of the prescribed disciplinary body’s code of conduct or professional standards. The disclosure must be for the purpose of enabling or assisting the prescribed disciplinary body to perform one or more of its functions. Professional disciplinary bodies will be prescribed in the regulations.
[Schedule #, item 1, table item 15 of the table in subsection 355-65(8) in Schedule 1 to the TAA]
- 1.25 Schedule # to the Bill also similarly amends the TASA to allow a TPB official to disclose official information to professional disciplinary bodies prescribed in

the regulations.

[Schedule #, item 4, provision(s) xx of Act(s) being amended]

- 1.26 Prior to prescribing any professional disciplinary bodies, consideration will be given to whether the body has appropriate processes and safeguards in place to ensure any disclosed information is dealt with in a way that allows relevant disciplinary processes to occur while ensuring the protected or official information is appropriately managed.

Safeguarding identifying information of taxpayers

- 1.27 The amendments include safeguards to ensure any disclosure does not include information that would disclose the identity of any taxpayer not involved in any wrongdoing represented by an intermediary that is the focus of the disclosure unless doing so would prevent action being taken against the intermediary. While noting that the disclosure of information to Treasury or to a prescribed professional disciplinary body may include the personal information of both the person involved in any breach of confidence as well as individual taxpayers, these safeguards and the limited circumstances in which this information can be on-disclosed ensures that any potential impact on a person's privacy is limited.
- 1.28 A taxation officer cannot disclose the ABN, name, contact details or personal information of any entity other than the entity that is suspected of the misconduct, unless the Commissioner of Taxation is satisfied that the inclusion of the information is necessary for the purposes of enabling or assisting in the consideration of the development or implementation of any measure, or the taking of any action, directed at dealing with the breach or suspected breach. The Commissioner is able to delegate this responsibility to a Second Commissioner or a member of the Senior Executive Service.
[Schedule #, item 1, paragraph (c) of table items 14 and 15 of the table in subsection 355-65(8) of the TAA]
- 1.29 Similarly, a TPB official cannot disclose identifying information about a third party unless the Chair of the TPB is satisfied that the inclusion of the information is necessary for the purposes of enabling or assisting in the consideration of the development or implementation of any measure, or the taking of any action, directed at dealing with the breach or suspected breach.
[Schedule #, item 4, section 70-40 of the TASA]

Use of offence-specific defences

- 1.30 Section 355-25 of the TAA makes it an offence for taxation officers to record or disclose protected information. Section 70-35 of the TASA makes it an offence for a defined person to record or disclose official information. Both the

TAA and the TASA currently contain a number of exceptions that allow for the disclosure of protected or official information in limited circumstances.

- 1.31 The exceptions to the general secrecy offences inserted into the TAA and TASA by Schedule # to the Bill therefore reverse the evidential burden of proof. The Guide to Framing Commonwealth Offences states that the use of offence-specific offences will be appropriate in circumstances where the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove the matter.
- 1.32 In relation to the disclosure of information to Treasury, a disclosure cannot be made unless there has been a breach of an obligation by an entity, or the discloser reasonably suspects there may have been a breach. In these circumstances, it is likely that the discloser may be the only person aware of the breach or potential breach, especially where the discloser reasonably suspects that a breach may have occurred. Additionally, it may be more difficult and costly for the prosecution to prove the matter.
- 1.33 In relation to the disclosure of information to prescribed professional disciplinary body, a disclosure cannot be made to a professional disciplinary body under the TAA or TASA unless the taxation officer or TPB official reasonably believes that there may have been a breach of a professional disciplinary body's code of conduct. As a result, whether a reasonable belief existed will be information that is peculiarly within the knowledge of the defendant and would be significantly more difficult for the prosecution to disprove. Therefore, it is appropriate to reverse the evidential burden of proof in this instance.
- 1.34 In relation to any on-disclosure made to the Minister or the Finance Minister, it may be peculiarly within the knowledge of the defendant as to what the purpose of any disclosure was as it may not be clear from the evidence available. As any on-disclosure is not required to be in writing, it may be more difficult or costly for the prosecution to disprove the matter.

Commencement, application, and transitional provisions

- 1.35 Schedule # to the Bill commences the day after Royal Assent.
[Table item x of the commencement table]
- 1.36 The amendments apply in relation to records and disclosures of information made on or after commencement of Schedule [#] to the Bill, whether the information was obtained before, on or after that commencement.
[Schedule #, item 5]
