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Ms Megan Bondietti
Manager
Small Business Entities and Industry Concessions Unit
Treasury
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Dear Ms Bondietti

Disclosure of business tax debts

CPA Australia represents the diverse interests of more than 164,000 members working in 150 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

The *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019* introduced into Parliament on 24 July 2019 includes the enabling provisions for business tax debt disclosures. CPA Australia has made a submission to the Senate Inquiry on this Bill in relation to Schedule 5 – Disclosure of business tax debts (see Attachment).

In that submission, we noted our ongoing concern about the potentially punitive nature of the proposal to allow the ATO to disclose outstanding business tax debts to a credit reporting bureau. We said that the disclosure of business tax debts needs to be carefully administered to ensure that businesses are not unduly or unfairly impacted by the policy. We also submitted that:

- The 90 day threshold be increased to 120 days
- Safeguards for unincorporated entities with a mix of business and non-business tax debts be designed, and
- A Notice of Removal of Business Tax Debts be inserted into the legislation.

Instrument should exclude other types of business tax debts

The Instrument, in effect, enables the disclosure of uncontested business debts that are not under a payment arrangement or that are subject to insolvency proceedings.

The ATO's collectable debt holdings stood at $23.7 billion as at 30 June 2018 with a further $21.5 billion in other collectable or non-pursued debt[1]. This includes $9.7 billion in debt subject to objection or appeal, $7.0 billion in insolvency debt and $3.7 billion that is irrecoverable at law. The ATO does not publish data on the amount of collectable debt under payment arrangements.

[1] p. 198, *Table 5.19 Activities and outputs – Revenue Assurance, 2015-16 to 2017-18*, Annual Report 2017-18, ATO

The Inspector-General of Taxation (IGT) 2015 Review into the ATO's approach to debt collection noted that around 75 per cent of small business collectable debt is for entities with turnover of less than $500,000 and that the majority of both income tax and other debts are aged less than six months.

The Instrument should therefore reflect the ATO's knowledge of the debt environment and its debt management practices to explicitly exclude debts that are:

- uneconomical to pursue
- irrecoverable at law, or
- less than 120 days overdue.

The Instrument should broaden the definition of 'effectively engaging' beyond entering payment arrangements or litigating

Given the Commissioner's ability to deny a payment arrangement in certain circumstances, the question arises as to whether the Instrument should exclude entities that are genuinely attempting to enter into arrangements, or who are making best efforts to comply with arrangements. The IGT Review raised potential issues in the ATO's administration of payment arrangements including requiring up-front payments of 50 per cent of outstanding debts or proof of viability.

The concern is that the Commissioner may choose to deny a payment arrangement, or the entity is unable to comply with certain requirements of the payment arrangement and there is no recourse – absent a complaint to the IGT – to prevent disclosure. This disclosure may lead to a constriction of credit availability and hence may compound the entity's financial viability. It may lead to liquidation or bankruptcy when, absent the disclosure, the business may have been viable.

A 'failure to engage effectively' should not necessarily be construed as an inability to obtain a payment arrangement, given the range of external factors and the power of the Commissioner to unilaterally approve (or reject) the application.

The IGT also noted in his February 2018 submission to Treasury that:

> "*affected taxpayers may consider that the payment arrangement, or otherwise, they are offering the ATO is reasonable but the ATO has not agreed to it. The IGT had previously examined such concerns in his Debt Collection review, including that ATO staff did not have sufficient capability to analyse the commercial viability of businesses and their particular circumstances, causing delays in negotiating payment arrangements*."

Therefore, consideration should be given to broadening the definition of 'effectively engaging' such as where:

- a serious hardship application has been received by the ATO and not yet been withdrawn or refused
- the taxpayer is actively seeking reasonable assistance from the ATO to manage financial difficulties, or
- the taxpayer is seeking to reasonably renegotiate the payment arrangement/s.

The Instrument should require the Commissioner to effectively engage with the taxpayer prior to issuing the Notice of Disclosure

The Instrument should place an onus on the Commissioner to maintain transparent and effective communication with entities prior to disclosure. Prior to serving the 'Notice to Report', the Commissioner should demonstrate prior service of debt payment notices and ongoing efforts to engage the taxpayer.

The concern is that there is no explicit requirement for the Commissioner to proactively seek engagement with the taxpayer prior to initiating the disclosure. Given the dependence of the ATO on automated mailing and contact processes, there is concern that business tax debt information may be disclosed to credit reporting bureaus without reasonable levels of ATO officer interaction or service, at least from the taxpayer's point of view. We reiterate the IGT's observation in its 2015 Review that "*as the impact of the ATO's debt recovery increases, so does the need for case management by ATO staff who should have direct accountability for the case.*"

The Instrument may encourage entities to avoid or delay disclosure, or pursue litigation

While we acknowledge the need to protect taxpayers who are subject to ATO compliance action, the exclusions in the Instrument may encourage taxpayers to lodge IGT complaints, objections or appeals as a means to delay the disclosure of tax debts. The delays may enable them to keep operating or prepare to phoenix without alerting credit providers thereby running counter to the policy objective. Almost $10 billion in debt subject to objection or appeal as at 30 June 2018 would not be disclosed under the proposed Instrument.

Alternatively, taxpayers may choose not to lodge or report correctly in order to avoid disclosure. As debt only arises upon assessment, entities in financial difficulty may avoid complying with lodgment obligations or report incorrectly in order to manage their debt below the thresholds. This can be counter-productive as it requires increased ATO resources to demand lodgment and review returns.

In our view, the overall benefit to the ATO, economy, credit providers and community of this policy should be made clearer. Reviews in recent years have found that the ATO generally manages debt effectively however there remains room for improvement, especially for small business debt. The Instrument should ensure that it safeguards against unintended consequences of its interaction with the ATO's general debt collection powers and principles as articulated in PS LA 2011/14. As such, careful administration and monitoring of this policy is required and a post-implementation review should be undertaken at a suitable point in time.

If you have any queries contact Gavan Ord, Manager Business and Investment Policy at CPA Australia on gavan.ord@cpaaustralia.com.au or 03 9606 9695.

Yours sincerely

Dr Gary Pflugrath CPA

Head of Policy and Advocacy
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Attachment

CPA Australia Senate Inquiry submission: Schedule 5 – Disclosure of business tax debts

The intent of the legislation is aligned with current policies to manage small business debts and address phoenix activities. However, CPA Australia remains concerned about potential issues with the administration of the disclosures. The proposal arguably extends the Commissioner's powers to disrupt a business beyond existing civil and criminal remedies.

CPA Australia is pleased to see that, following the consultation in 2018, the disclosure threshold has been increased to $100,000. However, there remains a lack of clarity of how credit reporting bureaus (CRBs) will manage, use and be accountable for the information. The disclosure of business tax debts needs to be carefully administered to ensure that businesses are not unduly or unfairly impacted by the policy; and that credit reporting bureaus abide by the conditions required by the legislation and the ATO in handling and using the disclosures, and removing them when required.

CPA Australia submits the following identified issues, many of which were previously identified during the May 2018 Treasury consultation:

1. **CRBs that are not credit reporting bodies should be bound by the credit reporting body obligations.** Credit reporting bodies as defined in the *Privacy Act 1988* are subject to specific provisions in that Act as well as the *Privacy (Credit Reporting) Code 2014* (the *Code*). These obligations should be extended to CRBs that are not credit reporting bodies to ensure consistency across all recipients of tax debt information. Further, CRBs should be obligated to manage and use tax debt information of businesses in the same manner as for individuals, as defined in the *Privacy Act 1988* and the *Code.*

2. **Legally enforceable obligation to remove tax debt information by Credit Reporting Bureaus (CRBs).** To build confidence in the measure, approved CRBs must be required to expunge any tax debt information within a week of being instructed by the ATO to remove that information. The ATO administrative approach states that if an entity no longer meets the criteria for reporting, CRBs will be instructed to remove tax debt information within two business days of ATO notification, and to cease showing or using the data in an entity's credit report or credit history.

   While this addresses a key concern, no detail is given on the ATO's reporting terms or the penalties which may be imposed in the event of non-compliance. Compensation should also be made available to any affected parties in the case of the misuse of information. Given the limited mandate of the Australian Information Commissioner over non-individual entities, the ATO should have the authority to review CRB records to ensure information is handled in accordance with the law and the ATOs administrative approach.

3. **Notice should be given of removal of information from CRB file.** Legislation should require that the ATO notifies the taxpayer when they have instructed the CRB to remove their tax debt information.

   A '*Notice of removal'* section should be inserted requiring:
   - The Commissioner to notify a primary entity when a credit reporting bureau has been directed to remove tax debt information from the primary entity's file, and
   - The notice must be in writing and served on the primary entity.

4. **Consider increasing the 90 day threshold to 120 days.** Due to the debt payment processes of many larger businesses, the 90 day threshold is a comparatively short period, especially for small businesses. Research by Xero shows almost half of invoices are paid late and many small businesses are paid 60 or more days after the invoice is issued. This can have a significant effect on the ability of some businesses to pay their tax liabilities.

   The quarterly business activity statement (BAS) cycle means that, in effect, if a taxpayer has not paid their BAS liabilities or entered into a payment arrangement prior to the lodgment of the next BAS, the debt will be disclosed to the CRB. This may be a significant, albeit often intermittent, challenge for many small businesses.

   CPA Australia therefore suggests that consideration be given to raising the threshold to at least 120 days to

reflect the reality of terms of trade, business finances, the business activity statement cycles and provide additional time to enter into payment arrangements with the ATO. Given the variety of situations which may give rise to tax debts and the potentially serious impacts on credit scores of those entities impacted, the ATO review process should include sign off by a senior ATO officer or a panel of senior officers.

5. **Safeguards should be put in place for entities that incur non-business related tax liabilities or who may have ABNs but are not running a business.** Unincorporated entities can incur tax liabilities associated with non-business activities such as from passive investments, trust distributions or capital gains, in addition to those generated by their business activities. To the extent that debts can be distinguished between business and non-business liabilities, only the business-related portion of overdue liabilities should be used to calculate the $100,000 threshold and be disclosed to CRBs. Alternatively, a threshold ratio could be considered to ensure that information is only disclosed where, for example, business-related tax debts exceed $100,000 and account for 80 per cent or more of total tax debts.

   CPA Australia also notes that the legislation may lead to an increase in predatory lending to businesses who wish to pay off tax debts to prevent disclosure to CRBs, especially where the ATO is unwilling to enter into a payment arrangement. This may compound, rather than resolve, small business liquidity challenges leading to a greater number of insolvencies than may otherwise be the case.