14 August 2019

Law Council
OF AUSTRALIA
Business Law Section

Economics Legislation Committee
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

AND

Manager
Small Business Entities and Industry Concessions Unit
Treasury
Langton Crescent
Parkes ACT 2600

By email: businesstaxdebt@treasury.gov.au; economics.sen@aph.gov.au

Dear Sir/Madam

Tax Debt Information Disclosure Proposals 2019
Treasury Laws Amendment (2019 Tax Integrity and Other Measures No 1) Bill 2019
Draft Taxation Administration (Tax Debt Information Disclosure) Declaration 2019

The Taxation Committee of the Business Law Section of the Law Council of Australia (**the Committee**) welcomes the opportunity to provide comments on the tax debt disclosure proposals contained in Treasury Laws Amendment (2019 Tax Integrity and Other Measures No 1) Bill 2019 (**the Bill**) and the Draft Taxation Administration (Tax Debt Information Disclosure) Declaration 2019 (**the Declaration**). The Committee previously provided comments to Treasury in February 2018 with regards to the earlier version of these proposals contained in the Treasury Laws Amendment (Tax Transparency) Bill 2018. Most of the earlier issues that were identified in our earlier submission have not been resolved and are reiterated below for convenience.

In particular we reference our earlier comments regarding the important role of the Inspector-General of Taxation in the proposed regime. It will be important to ensure that sufficient additional resources are made available to the Inspector-General to deal with the additional consultation and complaints-handling workflow that form a staple part of the new measures.

Comments specific to the Bill

1. The Committee submits that the Commissioner of Taxation (**the Commissioner**) should be obliged to give notice to a primary entity in the prescribed form as required by proposed sub-section 355-72(3) if the information that the Commissioner intends to provide to a credit reporting bureau by way of update, correction or confirmation may be adverse to the interests of the primary entity. A relatively small tax debt might be initially disclosed to a credit reporting bureau but the Commissioner might at a later time determine that a significantly larger debt is owed. Without notification to the primary entity, a seriously adverse report could be made without the same level of scrutiny as the initial disclosure. Proposed subparagraph 355-72(2)(b) should be either

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

narrowed to only apply to further disclosures that are not adverse to an entity or deleted in its entirety.

2. Secondly, the Committee submits that designation of an entity as a credit reporting bureau should be subject to direct review by the Parliament. Proposed subsection 355-72(7) would provide a broad power to the Commissioner to recognise an entity as a 'credit reporting bureau' and simply publish a list of recognised credit reporting bureaus on the Australian Taxation Office (**ATO**) website. Given the importance of protecting the confidentiality of taxpayer information as recognised by subdivision 355-B of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**), the Committee submits that the following protections are necessary:

    a) The Commissioner should consult with the Australian Information Commissioner prior to recognising an entity as a credit reporting bureau, in recognition of the need to coordinate with the important protections with regard to credit reporting more generally that are contained in Part IIIA of the *Privacy Act 1988* (Cth); and

    b) The Commissioner's designation of an entity as a credit reporting bureau should be by way of a disallowable legislative instrument, in the manner currently utilised in relation to the Commissioner's exercise of the remedial power provided under section 370-5 of Schedule 1 to the TAA.

3. Finally, the procedural conditions and safeguards in proposed subparagraph 355-72(1)(e) that the Commissioner must satisfy before disclosing a taxpayer's tax debt information should be amended to provide:

    a) A period of 28 days (rather than 21) to respond to a notice issued by the Commissioner under subsection 355-72(2); and

    b) The Commissioner must be required to have taken reasonable steps to recover the debt. The types of other options open to the Commissioner to engage with taxpayers regarding the management of tax debts are set out in paragraphs 5.15 and 5.16 of the Explanatory Memorandum and include phone calls, letters, text messages and garnishee orders. The recent proliferation of scams involving the impersonation of ATO tax officers and demands for the immediate payment of tax debts means extra effort should be taken by the Commissioner to ensure proper communication with taxpayers with regards to any tax debt.

    These additional safeguards are features of the equivalent New Zealand regime introduced in 2017 and recently rewritten by the *Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Act 2019* (NZ).

Comments specific to the draft Declaration

4. The Committee submits that the draft Declaration should be amended to add 'individuals' to the categories of excluded entities in proposed subparagraph 6(1)(a). Reasons for this exclusion are provided in the more detailed comments below.

5. Further the Committee submits that the proposed list of circumstances under which a tax debt will not be included in total tax debts, in subsection 6(2) of the draft Declaration, is incomplete and defective. In order to more comprehensively reflect the variety of circumstances that should be considered to either meet the test of 'effective engagement' with the ATO or to show that action is being taken in accordance with the law to dispute the debt, the following additions to the list in proposed subsection 6(2) are recommended:

a) Where the Commissioner has agreed to a deferral of payment time under section 255-10 or Schedule 1 to the TAA; and

b) If individuals are to remain within the scope of these provisions, where an individual has applied for release of a tax debt on the basis of serious hardship under section 340-5 of Schedule 1 of the TAA and the Commissioner has not yet made a decision in relation to the application or, if the application has been denied, the individual has lodged a taxation objection in relation to the decision under Part IVC of the TAA; and

c) Where the Commissioner has made an objection decision (as contemplated in proposed subparagraph 6(2)(b)) or proceedings of the AAT or Federal Court of Australia in relation to an application for review or appeal have come to an end (as contemplated in proposed subsection 6(2)(c)) but the period to lodge an application for review or appeal of that decision has not yet expired; and

d) Where an entity has commenced legal proceedings to call the tax debt into question and those proceedings are still pending; and

e) Where an entity has filed a defence in recovery proceedings. Both (d) and this addition are necessary given that some tax debts, as that term is broadly defined for the purposes of the TAA, are not susceptible to challenge under Part IVC of the TAA. For example in relation to the issuance of a Director Penalty Notice pursuant to Division 269 of Schedule 1 to the TAA.

Detailed Comments on Application to Individuals

6. According to the original announcement of the proposal as part of the 2016-17 Mid-Year Economic and Fiscal Outlook and as re-iterated in Chapter 5 of the Explanatory Memorandum accompanying the Bill at paragraph 5.3, the rationale for authorising disclosure of tax debts to credit reporting agencies is to reduce the unfair financial and competitive advantage obtained by businesses that do not pay their tax on time. The new measures were therefore to apply to business taxpayers and the draft Declaration limits the declared class of entities to those registered in the Australian Business Register.

7. One class of entities that obtain ABNs are individuals. Although individuals may obtain an ABN, invariably their business activities are subordinate to their personal lives. Nevertheless, an individual's tax debts potentially subject to disclosure include tax debts related to both personal and business activities and any disclosure to a credit reporting bureau could result in a denial of credit not only in relation to business finance but also for personal finance, including credit cards and home loans.

8. Although the increase in the tax debt threshold from the original proposal of $10,000 to the current proposal of $100,000 would exclude many individuals, the fact still remains that two individuals with the identical level of tax debt will be treated differently if one happens to have an ABN.

9. Under subparagraph 6(1)(a) of the draft Declaration, deductible gift recipients, complying superannuation funds, registered charities and government entities are excluded from the credit reporting measures. The Explanatory Statement accompanying the draft Declaration states that these entities are excluded 'as their main purpose and operation is not the carrying on of a business or similar venture'. Likewise, an individual's main purpose and operation is not carrying on a business and,

therefore, it would be consistent with the policy objectives of the new legislation for individuals to be excluded from the new measures.

10. Many individuals carry on small businesses that require them to obtain an ABN, including doctors, lawyers, farmers, trades persons, cleaners and taxi drivers. They will all be at risk of losing access to credit to fund personal expenses if the Declaration is made in its current form.

Should you wish to discuss further any aspects of the submission please do not hesitate to contact Clint Harding, Chair of the Committee (charding@abl.com.au or 02 9226 7236).

Yours Sincerely,



Rebecca Maslen-Stannage
Chair, Business Law Section