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28 January 2016

EY comments on Commissioner's proposed remedial power to modify law

Dear Mr Reid

EY welcomes the opportunity to provide comments on the exposure draft material released on 4 December 2015 to implement the Government's announcement that it would provide the Commissioner of Taxation (Commissioner) with a remedial power to ensure that taxation and superannuation laws can be administered consistently with their purpose. The exposure draft material comprises draft legislation (draft Bill), accompanying explanatory memorandum (draft EM), and an information paper (paper) which outlines the administrative framework to implement the proposed remedial power.

EY has been a long-term supporter of this much needed initiative, which emerged from recommendations made by the Tax Design Review Panel (TDR panel). EY's previous submissions include:

- Extracts from a letter and attachments sent to the Board of Taxation and the Assistant Treasurer on 13 November 2013 outlining how the Commissioner's powers could be enhanced to cover gaps in the tax law, concessionally for the benefit of taxpayers
- Comments on the 2009 Treasury discussion paper "An 'extra-statutory concession' power for the Commissioner?" (dated 17 July 2009)
- EY submission to the TDR panel (dated 28 March 2008)

Copies of these previous submissions are attached in Appendix A for your reference.

General comments

EY continues to strongly support the development of a formal power for the Commissioner to provide relief to taxpayers in relation to gaps in the tax legislation, where these operate against taxpayers. It cannot be underestimated how potentially significant this proposal may be in improving the overall efficiency of the administration of the tax and superannuation law.

The proposal, with significant governance and process, is an appropriate initiative given that this innovative remedial power needs to be implemented cautiously given concern about inappropriately wide powers being given to the Commissioner.

That said, we submit to Treasury and the government that a post-implementation review of the process and scope of the Commissioner's remedial power should be scheduled, for say four or 5 years after its implementation, by either the Inspector General of Taxation or alternatively the Board of Taxation. This review would need to cover the entire process and the scope for further refinement of the power at that time.

We believe that, on balance, the approaches taken in the draft Bill, paper and draft EM [which will allow the Commissioner to modify the operation of a provision of a tax law, in favour of taxpayers, where that modification is not inconsistent with the purpose or object of the provision and any budget impact from the modification is negligible], are reasonable and appropriate to achieve the desirable tax administration enhancements we support.

We provide specific comments on the consultation questions raised in the paper.

Consultation question 1 - “Do you agree that the proposed consultation process will be appropriate to obtain relevant stakeholder input?”

We agree that a robust and transparent governance process should be designed and implemented for this unique, but necessary, ‘extra-statutory concession’.

Based on the explanatory material, a comprehensive and rigorous decision making process, and oversight process is proposed for any exercise of the proposed Commissioner’s remedial power. We believe that these proposals are more than adequate to provide an acceptable level of quality assurance for the proposed Commissioner’s remedial power. We do not believe that any additional safeguards are required, at this stage.

However, whilst this was not raised in the exposure draft material, we believe there is merit in having a post-implementation review of the Commissioner’s remedial power undertaken say 4-5 years after enactment.

Consultation question 2 - “Do you agree that the administrative process proposed by the ATO achieves the right balance between ensuring robust consideration of issues including thorough consultation with stakeholders, and flexibility to ensure that issues can be resolved in a timely manner?”

We recognise that a balance is required between ensuring a robust quality assurance process for the proposed remedial power, and timely resolution of the underlying tax issue. Furthermore, we appreciate that in relation to any initial application of the proposed remedial power, that the balance is likely to fall in favour of ensuring that quality assurance considerations are fully addressed.

To improve Australia’s tax law-making environment, the proposed power will need strong administrative processes and project management, to see timely progress on issues. So there might be room to improve the language of the draft Explanatory Memorandum:

“1.13 The Remedial Power does not change the requirement for the Commissioner to pursue an interpretation of the law which can achieve the purpose or object of the law in the first instance or to seek to use his or her general powers of administration. The Remedial Power is to be exercised as a power of last resort where the other options available to the Commissioner (such as applying purposive principles to the interpretation of the relevant taxation law or using the general powers of administration) have been considered and found not to provide a suitable solution. In some cases, it may be more appropriate for the Commissioner to seek an amendment to the primary legislation, rather than to use the Remedial Power.”

to highlight that the workflow on whether to:

- a) Use existing administration powers or
- b) Seek legislative reform or

c) Use the remedial power

will see measured consideration but will proceed in a timely manner with a view to enhancing certainty for the Australian tax system, taxpayers and administration.

Consultation question 3 - What would be an appropriate sunset period for legislative instruments made under the Remedial Power?

Under the *Legislation Act 2003*, all legislative instruments sunset after 10 years unless they are explicitly exempted, actively re-made or the sunset period is deferred by the Commonwealth Attorney-General.

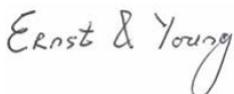
In our view, this standard approach should also be applied to legislative instruments made under the proposed Commissioner's remedial power (rather than 5 years as suggested in the paper). Our preference would be for the suitability of this approach to be scrutinised as part of any post-implementation review of the Commissioner's remedial power.

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Should you wish to discuss any of the issues raised in this submission further, please do not hesitate to contact any of Alf Capito (02) 8295 6473, Richard Czerwik (03) 9288 8408 or Tony Stolarek on

(03) 8650 7654.

Yours sincerely



ERNST & YOUNG

Appendix A – Previous EY submissions

<p>Extracts from a letter and attachments sent to the Board of Taxation and the Assistant Treasurer on 13 November 2013 outlining how the ATO powers could be enhanced to cover gaps in the tax law, concessionally to the benefit of taxpayers</p>	<p>Click on the paperclip to access the PDF document</p>   <p>EY-Tax-Policy-Submission (2).pdf</p>
<p>EY comments (dated 17 July 2009) to the 2009 Treasury discussion paper</p>	<p>Click on the paperclip to access the PDF document</p>   <p>Ernst & Young submission - extra sta</p>
<p>EY submission to the TDR panel (dated 28 March 2008)</p>	<p>Click on the paperclip to access the PDF document</p>   <p>Ernst & Young to Tax Design Review Panel</p>