



## Australian Government

### The Treasury

## COMMISSIONER OF TAXATION'S ABILITY TO RETAIN REFUNDS

### SUMMARY OF CONSULTATION PROCESS

The Government announced on 15 February 2012 that it would amend the law in response to the Full Federal Court's decision in *Commissioner of Taxation v Multiflex Pty Ltd* [2011] FCAFC 142 (*Multiflex*).

The measure was included in Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, which was introduced into Parliament on 1 March 2012.

#### Consultation process

Consultation on the draft legislation was initially conducted as part of a wider consultation for the assessment of indirect taxes measure between 18 January 2011 and 15 February 2011, and on revised draft legislation between 22 August 2011 and 18 September 2011.

Following the Full Federal Court's decision, consultation on further revised draft legislation was conducted between 15 and 21 February 2012, with a consultation meeting held on 17 February 2012. 12 public submissions were received.

Submissions can be viewed by clicking on the following links.

[Submissions – assessment of indirect taxes](#)

[Submissions – assessment of indirect taxes \(revised\)](#)

[Submissions – draft legislation](#)

#### Summary of key issues

*In general, submissions acknowledged the need for a legislative provision to allow the Commissioner to verify certain refund claims prior to payment. Submissions mostly focused on the scope of the Commissioner's powers, the length of time before objection rights were triggered and concerns with how the drafting of the provisions could potentially be interpreted. Whilst some submissions did raise concerns with the policy underlying some of the changes, they accepted that the absence of a legislative provision could have detrimental revenue consequences.*

#### Consultation on the assessment of indirect taxes

*In response to an earlier version of these amendments, originally contained in exposure draft legislation for the assessment of indirect taxes measure, stakeholders raised concerns regarding the scope of the discretion, the timing and nature of review rights and the obligations imposed on the Commissioner if he or she exercised the discretion.*



## Australian Government

### The Treasury

#### Consultation on exposure draft legislation

*The exposure draft released following the Full Federal Court's decision in Multiflex, contained significant revisions to address concerns raised in response to the August 2011 version of the provision, including the adoption of a two stage test with a stricter threshold test at the second stage and a reduction in the period before taxpayers' objection rights are enlivened from six months to 60 days at the first stage and a maximum of 14 days at the second stage. Additional obligations were imposed on the Commissioner to inform the taxpayer if he or she decides to retain the refund at each stage. The amendments were also redrafted to apply consistently to all running balance account surpluses and other credits.*

*Key issues and suggestions raised in relation to the exposure draft legislation included: a concern that the test could be interpreted as being subjective, concerns that the factors were biased in favour of the Commissioner, the lack of a default retention period, a concern with the nature of the review right, requests that the obligation to the taxpayer be in writing, a suggestion that the Commissioner should be able to request information at the time of informing the entity and a concern that taxpayers could be inadvertently affected by information requests made of third parties.*

*To address these concerns, the legislation has been amended to collapse the two-stage test into a simpler single-stage test which requires the Commissioner to apply the factors (including new factors) for determining the reasonableness of retaining a refund at the time of first exercising the discretion to retain. The initial retention period (generally 14 or 30 days depending on the relevant tax law) has also been clarified through drafting changes. A new provision has been inserted to allow the Commissioner to request information during the initial retention rate.*

*In the interests of efficiency, and noting that a number of enquiries made by the Commissioner are resolved informally through conversations with the taxpayer, the initial obligation to inform is not required to be in writing. However, the Commissioner will be required to inform the taxpayer of his or her objection rights in writing within 7 days of that right arising.*

*The legislation has also been redrafted to clarify that the objection is to the Commissioner's decision to retain the amount, and is appropriate as a direct review of the Commissioner's actions. Further, only information requests made to the taxpayer rather than third parties can extend the period of time before taxpayers' objection rights arise.*

*The explanatory memorandum has also been significantly amended to reflect the amendments, and to provide greater clarity on the application of the provision and the intended policy outcome.*

*It was suggested that objection rights should be provided at the first instance or within a shorter period of time. 60 days is considered to be an appropriate balance between the taxpayer's right to review and the ability of the Commissioner to verify the information.*

*No changes were made in response to the suggestion for a 'floor amount' before the provision applies, as it could provide opportunities to circumvent the law. The quantum of the refund is relevant in the consideration of a number of the prescribed factors.*



## Australian Government

---

### The Treasury

*Other issues that were raised during consultation that were beyond the scope of the Government's decision included comments that the interest paid by the Commissioner was too low and that the disputed amount should be a deduction for income tax purposes.*

#### **Feedback**

Feedback on the consultation process for this measure can be forwarded to [consultation@treasury.gov.au](mailto:consultation@treasury.gov.au) . Alternatively, you can contact Margot Tredoux on (02) 6263 2096 or Jenny Lin on (02) 6263 3865.

Thank you to all participants in the consultation process.