

Improving the transparency of Australia's business tax system

Discussion Paper
April 2013

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CONSULTATION PROCESS

Request for feedback and comments

On 4 February 2013, the Assistant Treasurer announced the Government's intention to improve the transparency of Australia's business tax system and that the Government would consider the views of the community in assessing what changes are appropriate.

The Government seeks your feedback and comments on the issues outlined in this discussion paper. As this paper provides details about how these proposals could be legislated, you may wish to comment on law design as well as policy design issues in your submission. It would assist the consultation process if those stakeholders who have any concerns with the proposals could provide practical examples in their submissions demonstrating the implications of these proposals and how any alternative approaches could operate.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

Closing date for submissions: 24 April 2013

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CONTENTS

- FOREWORD.....3
- SUMMARY5
- 1. BACKGROUND.....7
- 2. TRANSPARENCY OF TAX PAYABLE BY LARGE AND MULTINATIONAL BUSINESSES8
- 3. PUBLISHING AGGREGATE COLLECTIONS FOR EACH COMMONWEALTH TAX10
- 4. ENHANCED INFORMATION SHARING BETWEEN GOVERNMENT AGENCIES10
- ATTACHMENT 1: COPY OF THE ASSISTANT TREASURER’S MEDIA RELEASE.....12

FOREWORD



Earlier this year I announced the Government's intention to improve the transparency of Australia's business tax system. This will encourage enterprises to pay their fair share of tax and discourage aggressive tax minimisation practices. I am therefore pleased to release this discussion paper that outlines three important proposals that would help achieve these aims.

These proposals have been developed following consultation with the Specialist Reference Group on *Ways to Address Tax Minimisation of Multinational Enterprises* and discussions with key corporate regulators. The Government is also keen to hear the views of the broader community before legislating these proposals.

I firmly believe that there is a need for a well-informed public policy debate on these issues, particularly as they relate to practices that have the potential to undermine the future sustainability of our corporate tax base. As I mentioned in my recent speech at the Tax Institute of Australia's 28th National Convention:¹

There is a strange circularity in the argument that large and multinational companies should be allowed to do what the tax law allows, but public policy debate on the appropriateness of those laws should not be informed by describing what those taxpayers have been and are doing.

There is a similar inconsistency in demanding the Government produce evidence that base erosion and profit shifting is a significant problem in the tax law while at the same time opposing measures that would increase the transparency of the tax affairs of large and multinational enterprises.

I strongly encourage you to participate in this consultation. Your input will assist the Government in deciding how best to proceed and, if appropriate, prepare the necessary legislation.

The Hon David Bradbury MP
Assistant Treasurer

¹ 'Stateless income — A threat to national sovereignty', Address to the Tax Institute of Australia's 28th National Convention, Convention and Exhibition Centre, Perth, Friday, 15 March 2013.

SUMMARY

On 4 February 2013, the Assistant Treasurer announced the Government's intention to improve the transparency of Australia's business tax system with a view to introducing necessary legislation later this year. A copy of the Assistant Treasurer's media release is at Attachment 1.

This paper outlines three proposals that could give effect to this announcement. Although the Government has, at this stage, not made decisions in relation to these proposals, stakeholders should consider both policy design and legislative design issues when preparing their submissions.

These proposals could complement existing corporate disclosure requirements and enhance the administration and regulation of Australia's tax system and capital markets.

As envisaged in the Assistant Treasurer's media release, a specific proposal to implement a transparency framework for large and multinational businesses was discussed at the first meeting of the Specialist Reference Group on *Ways to Address Tax Minimisation of Multinational Enterprises* on 26 February 2013.

A short overview of each of the three proposals is set out below.

- Transparency of tax payable by large and multinational businesses.
 - The objective of this proposal is to enable the public to better understand the corporate tax system and engage in tax policy debates, as well as to discourage aggressive tax minimisation practices by large corporate entities.
- Publishing aggregate collections for each Commonwealth tax.
 - The objective of this proposal is to enable better public disclosure of aggregate tax revenue collections, even when the identity of particular entities could potentially be deduced.
- Enhanced information sharing between Government agencies.
 - The objective of this proposal is to build on existing information sharing arrangements and enable greater information sharing between the Australian Taxation Office (ATO) and the Department of the Treasury with respect to foreign acquisition and investment decisions affecting Australia.

1. BACKGROUND

A fair, competitive and sustainable tax system is critical for the future prosperity of the nation. Australia's tax system raises the revenue necessary to provide the public goods and services our society expects and requires.

Tax systems that rely on voluntary compliance require strong public confidence. If the community feels that the tax system is not fair, there could be heightened efforts to avoid tax. Compliance efforts to plug resulting revenue gaps may involve more intrusive measures, including complex tax law. Ultimately, this can cause a loss of confidence thereby undermining the tax system's sustainability.

The apparent ease with which some large corporate entities can shift taxable profits and erode a country's tax base is shaping up as a shared concern for the G20 and most OECD countries.

Subject to a limited range of exceptions to facilitate efficient and effective Government administration and law enforcement, section 355-25 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) currently makes it an offence, punishable by two years' imprisonment, for any taxation officer (including the Commissioner of Taxation (the Commissioner)) to disclose protected information. Protected information is defined in subsection 355-30(1) of Schedule 1 to the TAA 1953 to mean information that:

- was disclosed or obtained under or for the purposes of a law that was a taxation law (other than the *Tax Agent Services Act 2009*) when the information was disclosed or obtained;
- relates to the affairs of an entity; and
- identifies, or is reasonably capable of being used to identify, the entity.

In the absence of a specific legislative exception, there is currently no scope for providing information to the public about the contribution that large and multinational enterprises are making to Australia's tax revenue.

The Government has a long established practice of publishing monthly financial statements setting out aggregate collections under different revenue heads.² In some cases, however, the particular circumstances have meant that the publication of the aggregate amount of tax under these provisions might, especially in conjunction with publicly available information, be reasonably capable of being attributed to a particular entity.

² For example, the Minister for Finance and Deregulation publicly released the Australian Government Monthly Financial Statements for January 2013 on 15 March 2013. A copy of the statement is available on the Minister's website at the following link: <http://www.financeminister.gov.au/media/2013/mfs-january-2013.html>.

2. TRANSPARENCY OF TAX PAYABLE BY LARGE AND MULTINATIONAL BUSINESSES

Under this proposal, the Commissioner would be required to publish limited tax return information of corporate tax entities³ with total income of \$100 million or more. In addition, the Commissioner would be required to publish similar information for all entities that have any MRRT or Petroleum Resource Rent Tax (PRRT) payable in a given year. The exact form of these publications would be left to the Commissioner but could, for example, be published on the ATO's website.

Imposing a statutory duty on the Commissioner to publish this information would ensure that the publications do not contravene the existing tax confidentiality provisions. This is because the publications would fall within an existing exception (in subsection 355-50(1) of Schedule 1 to the TAA 1953) for disclosures in the performance of a taxation officer's duties. The duty could be located in 'Part 1A – Administration' of the TAA 1953, which currently imposes duties on the Commissioner such as a duty to provide the Minister with an annual report (in section 3B).

Specifically, for corporate tax entities with a reported total income for the year of \$100 million or more, the Commissioner would publish their Australian Business Number (ABN) and name, as well as their reported total income, taxable income and income tax payable. One consequence of using the concept of taxable income is that entities that have nil taxable income or a tax loss position would be reported as not having a taxable income.

For any entity with MRRT or PRRT payable in a year, the Commissioner would publish their ABN and name, as well as the amount of MRRT or PRRT payable as reported in their respective returns. Of note, MRRT does not become payable until the miner's 'group mining profit' exceeds \$75 million.

This proposal would allow the Commissioner to source all the necessary information from the entity's tax return(s) at a point in time, thereby ensuring that no additional compliance costs are placed on taxpayers.

Although the concept of an entity's 'total income' is not defined in the tax laws, it is envisaged that the Commissioner would use the information currently disclosed by corporate tax entities at question six of the company income tax return. This question aims to identify the entity's total gross income for accounting purposes. As such, total income may include amounts of exempt income, non-assessable and non-exempt income and foreign source income. It may also include extraordinary amounts of revenue such as net domestic or foreign source gains arising from events outside the ordinary operations of the entity. This means that an entity's total income is broader than the taxation concepts of ordinary income and statutory income, as referred to in section 6-1 of the *Income Tax Assessment Act 1997*. It is also broader than common notions of an entity's turnover.

This proposal would apply in relation to:

- the 2013-14 and later income years;
- the first MRRT year starting on or after 1 July 2013 and later MRRT years; and

³ Corporate tax entities include companies, corporate limited partnerships, corporate unit trusts and public trading trusts (as per section 960-115 of the *Income Tax Assessment Act 1997*).

- the year of tax (within the meaning of the *Petroleum Resource Rent Tax Assessment Act 1987*) starting on 1 July 2013 and later years of tax.

Example 1

Assume there are three corporate tax entities (A1 Ltd, B1 Ltd and C1 Ltd) that each have a total income of \$100 million or more in the 2013-14 income year, and a fourth company (Z Ltd) that has a total income of \$99 million in the same income year.

Under this proposal, the Commissioner would need to make the following information publicly available in relation to that income year (although it would be a matter for the Commissioner to determine the form of the publication).

| Name | ABN | Total income | Taxable income | Income tax |
|--------|----------------|---------------|----------------|---------------|
| A1 Ltd | 10 234 567 890 | \$500,000,000 | \$400,000,000 | \$120,000,000 |
| B1 Ltd | 97 876 543 210 | \$300,000,000 | \$101,000,000 | \$10,000,000 |
| C1 Ltd | 10 293 847 756 | \$120,000,000 | — | — |

Note that C1 Ltd is reported as not having a taxable income and this could be because it has either nil taxable income or is in a tax loss position. Note too that Z Ltd is not reported as it does not have total income of \$100 million or more.

Example 2

Assume there are two entities (A2 Ltd and B2 Ltd) that each have MRRT payable amounts for the 2013-14 year of tax.

Under this proposal, the Commissioner would need to make the following information publicly available in relation to that year of tax (although it would be a matter for the Commissioner to determine the form of the publication).

| Name | ABN | MRRT payable |
|--------|----------------|--------------|
| A2 Ltd | 84 545 109 742 | \$20,000,000 |
| B2 Ltd | 65 743 079 112 | \$5,000,000 |

3. PUBLISHING AGGREGATE COLLECTIONS FOR EACH COMMONWEALTH TAX

In the past, there have been difficulties in reporting aggregate amounts of tax revenue collected or assessed when the identity of particular entities could potentially be deduced, particularly when combined with other (publicly available) information. This proposal would ensure that such aggregate (de-identified) amounts can be disclosed and published even if this possibility exists.

To ensure that the privacy of individuals is protected, this proposal would not apply if the information could reveal the identity of individual (natural person) taxpayers.⁴ While it is unlikely that aggregate tax imposed under a particular provision could be used to identify natural persons, this proposal ensures that disclosures of aggregate data under future tax laws would not infringe the privacy of individuals (which is consistent with the ATO's obligations under the *Privacy Act 1988*).

This proposal would apply in relation to all disclosures or records of protected information made on or after Royal Assent of the amending legislation, even if the information to which the record or disclosure relates was acquired before that time.

Example 3

Assume that it is publicly known that there are only two taxpayers (ABC Ltd and XYZ Ltd) that each have a beer excise liability due in April 2014. Arguably, this total amount of revenue could constitute protected information as it relates to the affairs of ABC Ltd and XYZ Ltd and could reasonably be used to identify the affairs of either or both taxpayers — particularly by the other party.

This proposal would ensure that the total amount of beer excise collected in April 2014 would not be protected information. This result would be reached notwithstanding that there are only two entities that pay the tax and that information about their tax affairs could reasonably be deduced from such disclosure.

Note that if either ABC Ltd or XYZ Ltd were an individual, the information could not be disclosed if it could reasonably be capable of revealing the identity of that individual.

4. ENHANCED INFORMATION SHARING BETWEEN GOVERNMENT AGENCIES

The taxpayer confidentiality provisions in Schedule 1 to the TAA 1953 provide a number of exceptions to facilitate Government administration and law enforcement, including in relation to corporate regulation, superannuation and finance.

⁴ Note that the Commissioner currently has a duty to publish annual reports on the operation of a number of tax laws. The obligation to report on those operations is not overridden by the requirements of the taxpayer confidentiality provisions because those provisions are subject to the exception for disclosures in the performance of duties as a taxation officer. Therefore it is possible that such reporting could be capable of being used to identify an individual or his or her affairs. The proposal would not affect this position.

Specific exceptions apply to allow disclosures to the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC), as well as the Secretary of the Department of the Treasury (the Secretary) for the purposes of briefing the Treasurer in relation to decisions made under the *Foreign Acquisitions and Takeovers Act 1975*. Together, these regulators play important roles in supporting Australia's robust capital markets.

The ATO has current memoranda of understanding with both ASIC and APRA to formalise arrangements for the exchange of information consistent with relevant laws including the confidentiality of taxpayer information and the *Privacy Act 1988*. These memoranda of understanding provide review processes to ensure they meet current operational requirements.

However, to ensure that existing information sharing arrangements operate effectively, the Commissioner will establish a biannual meeting of relevant officers from the ATO and ASIC, APRA and Treasury (in relation to Foreign Investment Review Board (FIRB) matters) to monitor current arrangements and implement any improvements. The ATO will provide a report to the Assistant Treasurer following each meeting.

Furthermore, discussions with corporate regulators have identified opportunities for changing the law to enhance the existing information sharing arrangements for various processes related to FIRB.

Under this proposal, the Commissioner and other taxation officers would be able to provide a greater range of information to the Secretary. The Commissioner and other taxation officers would be allowed to provide protected information to the Secretary for the purposes of:

- briefing the Treasurer in relation to a decision that the Treasurer may make in accordance with the document issued by the Treasurer known as Australia's Foreign Investment Policy;⁵ or
- briefing an officer of the Department of the Treasury who is authorised by the Treasurer to make a decision that the Treasurer may make either under the *Foreign Acquisitions and Takeovers Act 1975* or Australia's Foreign Investment Policy document.

This proposal would apply in relation to all disclosures or records of protected information made on or after Royal Assent of the amending legislation, even if the information to which the record or disclosure relates was acquired before that time.

The Government has also moved to introduce legislation to allow the ATO to share taxpayer information with the Parliamentary Budget Office, consistent with similar information sharing arrangements the ATO has with Treasury.

⁵ A copy of Australia's Foreign Investment Policy is available on the Foreign Investment Review Board's website at the following link: <http://www.firb.gov.au/content/policy.asp?NavID=1>.

ATTACHMENT 1: COPY OF THE ASSISTANT TREASURER'S MEDIA RELEASE

GREATER TRANSPARENCY OF TAX PAID BY LARGE AND MULTINATIONAL BUSINESSES

Today the Government is announcing its intention to improve the transparency of Australia's business tax system.

'Large multinational companies that use complex arrangements and contrived corporate structures to avoid paying their fair share of tax should not be able to hide behind a veil of secrecy', said Assistant Treasurer David Bradbury MP.

Protecting taxpayer confidentiality for individuals is essential, but recent events in Australia and around the world call into question whether large and multinational businesses should have the same level of confidentiality about the taxes they have paid.

Improving the transparency of Australia's business tax system will encourage enterprises to pay their fair share of tax and discourage aggressive tax minimisation practices. It will allow the public to better understand the business tax system and engage in debates about tax policy.

The Government will also explore ways to improve the sharing of tax information between the ATO and other key corporate regulators including the Foreign Investment Review Board, the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority.

This work will enhance the administration and regulation of Australia's tax system and capital markets.

'That is why I have asked Treasury, in consultation with the Specialist Reference Group on *Ways to Address Tax Minimisation of Multinational Enterprises* I announced in December last year, to develop the details of how changes could be implemented', said Mr Bradbury. In particular:

- how the policy could best be designed to cover large and multinational businesses, including whether a threshold test would be appropriate;
- which federal taxes should be disclosed; and
- how the tax information should be made publicly available.

In announcing this work, the Government wishes to strongly reaffirm its support for the privacy of individuals' taxpayer confidentiality. The Government will not publicly disclose the tax information of individuals or small businesses.

Following the first meeting of the Specialist Reference Group later this month, the Government will consider the advice from Treasury and views of the community to assess what changes are appropriate, with a view to introducing any necessary legislative changes this year.

4 February 2013