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Dear Manager,

**Transparency of Business Tax Debts**

The Inspector-General of Taxation (IGT) is pleased to provide the attached submission with respect to the recently announced consultation on the proposed Transparency of Business Tax Debts measures.<sup>1</sup>

The IGT has reviewed all relevant material provided and has sought to recommend improvements which ensure the measures operate efficiently and equitably for all parties and fulfil the legislative intent.

In summary these improvements, largely, require the Australian Taxation Office (ATO) to inform affected taxpayers that they can lodge a complaint with the IGT, if they have not already done so, and consider the IGT's findings with respect to that complaint before disclosing information about any tax debt to Credit Reporting Bureaus. There are also recommendations regarding how the ATO notifies affected taxpayers and the type of engagement between the two that precludes the ATO from making any disclosure.

Please contact Jarrod Joseph, Director, on (02) 8239 2102 if you have any queries in relation to the IGT's submission.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Ali Noroozi', written over a horizontal line.

Ali Noroozi  
Inspector-General of Taxation

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<sup>1</sup> The Hon Kelly O'Dwyer MP, Transparency of business tax debts (Media Release, 11 January 2018).

# INSPECTOR-GENERAL OF TAXATION: SUBMISSION ON TRANSPARENCY OF BUSINESS TAX DEBTS MEASURES

1.1 The Inspector-General of Taxation (IGT) welcomes the opportunity to make a submission to the Government's consultation on the draft Transparency of Business Tax Debts (TBTD) measures.

1.2 The exposure draft materials relating to the TBTD consultation include the draft Bill (Bill) and accompanying Explanatory Memorandum (EM) as well as the draft declaration or Legislative Instrument (LI) and associated draft Explanatory Statement (ES). There is also the Australian Taxation Office's (ATO) consultation paper (ATO CP) which sets out how the measures would be administered. The latter is an important initiative consistent with the recommendation made by the IGT in his *Review into improving the self assessment system*.<sup>2</sup> However, the ATO CP contains a disclaimer which, whilst appropriate at the exposure draft stage, should be removed when issuing in final form such that all parties can rely on the guidance it contains.

1.3 The IGT has reviewed the above material and notes that a new and specific role is envisaged for the IGT who is to provide independent assurance and safeguard with respect to the administration of the measures. This is achieved through a complaint investigation mechanism for affected taxpayers.

1.4 In this submission, the IGT has sought to recommend improvements which ensure the measures operate efficiently and equitably for all parties and fulfil the legislative intent. Broadly, the recommended improvements require the ATO to inform affected taxpayers that they can lodge a complaint with the IGT, if they have not already done so, and consider the IGT's findings with respect to that complaint before disclosing information about the related tax debt to Credit Reporting Bureaus (CRB). There are also recommendations regarding how the ATO notifies affected taxpayers and the type of engagement between the two that precludes the ATO from making any disclosure.

1.5 The submission is structured around the following four requirements:

- the Commissioner of Taxation (Commissioner) requirement to take reasonable steps to *confirm* with the IGT;
- the Commissioner requirement to *consult* with the IGT;
- the Commissioner requirement to provide a *notice* to the affected taxpayer; and
- the taxpayer *effective engagement* requirement.

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<sup>2</sup> IGT, *Review into improving the self assessment system* (2013) Rec 5.3.

## COMMISSIONER REQUIREMENT TO TAKE REASONABLE STEPS TO CONFIRM WITH THE IGT

1.6 The effective starting point from an affected taxpayer's perspective is the satisfaction of the LI requirements referred to in paragraph 355-72(1)(c) and subsection 355-72(5) of the Bill in relation to the class of entities that may have their tax debts disclosed to CRBs.

1.7 Paragraph 7(1) of the LI sets out certain tests, the key one for present purposes, being paragraph 7(1)(e) which requires that:

the Commissioner has taken reasonable steps to *confirm* that the Inspector-General of Taxation does not have an active complaint from the entity [or affected taxpayer] that is, or could be, the subject of an investigation... relating to the Commissioner's intention to disclose the tax debt information of the entity.

1.8 Accordingly, before the ATO may contemplate disclosure of an affected taxpayer's debt information, the ATO must take reasonable steps to *confirm* that the IGT does not have an active complaint from the affected taxpayer prior to notifying them of the intended disclosure. Where the affected taxpayer has made a complaint to the IGT, the ES states that the Commissioner would generally not disclose the entity's tax debt information to CRBs.<sup>3</sup>

1.9 If the Commissioner *confirms* with the IGT that there is an active complaint that is, or could be, subject of an investigation, the process ends and no disclosure is possible. If there are no complaints on foot with the IGT, the Commissioner may proceed with the disclosure subject to a number of other requirements in the Bill.

### Example 1 - Complaint made to IGT before ATO considers disclosing information

A sole trader has lodged a complaint with the IGT in relation to difficulties reaching an agreement on a suitable payment arrangement with the ATO to pay their tax debt.

Once the tax debt has been outstanding for more than 90 days, the ATO considers disclosure to CRBs. The ATO checks with the IGT as to whether the IGT is investigating a relevant complaint. The IGT confirms a relevant complaint exists.

The ATO does not issue a written notice regarding possible disclosure of the taxpayer's debt information to a CRB.

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<sup>3</sup> The IGT is an independent statutory agency from the ATO. The IGT may make non-binding determinations with respect to complaint investigations.

## COMMISSIONER REQUIREMENT TO CONSULT WITH THE IGT

1.10 The next step in the process provided in the Bill is a requirement for the Commissioner to:

(e) in the case of a disclosure of information... both:

(i) the Inspector General has been consulted on the disclosure; and

(ii) 21 days have passed after a notice under subsection (2) of this section was given to the primary entity for the disclosure.

1.11 Accordingly, the Commissioner is required to *consult* with the IGT on the disclosure separately from the requirement that 21 days has passed after notice is given to the affected taxpayer. Thus, both requirements need to be satisfied before the Commissioner can proceed further.

1.12 The challenge is that the Commissioner may *consult* the IGT at any time during this 21 day period. For example, the Commissioner could *consult* with the IGT on day one of the affected taxpayer's notice period at which time there was no relevant complaint on foot as contemplated by the LI. However, subsequently and within the 21 day notice period, the taxpayer may make a complaint to the IGT which is otherwise consistent with the intention of the provision. In this case, the Commissioner has met the above LI requirement even though a relevant complaint has been lodged with the IGT.

1.13 The above anomaly can be addressed by requiring the Commissioner to notify the taxpayer first and only seek to *consult* with the IGT seven days after the 21 day notice period has ended. It is acknowledged that this would effectively extend the period from 21 days to 28 days in total, but in doing so, the intention of the provision is better achieved and reduces the potential for affected taxpayers being stymied in pursuing their right to complain to the IGT by a mere technicality.

1.14 For completeness, it should be noted that the ES states that where a subsequent disclosure of a taxpayer's debt information (not being an initial disclosure) is to be made, the Commissioner is still required to take reasonable steps to *confirm* that there is not a complaint on foot with the IGT although a more streamlined process is envisaged.<sup>4</sup> The ES further explains that an ATO officer cannot disclose the tax debt information until the complaint lodged with the IGT has been resolved.<sup>5</sup> However, neither the Bill nor LI formally requires the Commissioner to further *consult* or *confirm* with the IGT in respect of subsequent disclosures. Accordingly the Bill and LI need to be amended to reflect the intent outlined in the ES.

1.15 Turning to the more important issue of the requirement in the Bill for the Commissioner to *consult* with the IGT, it is crucial to understand what constitutes *consult* and its interaction with the LI requirement to *confirm*.

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<sup>4</sup> Treasury, Draft Explanatory Statement, Tax Debt Information Disclosure Declaration (2018) p 6.

<sup>5</sup> It is noted that complainants are also entitled to seek an internal review of IGT decisions.

1.16 The requirement, in the Bill, for the Commissioner to *consult* with the IGT seems to be a purely procedural step and little guidance is provided as to how it may be satisfied. It is the LI requirement of taking reasonable steps to *confirm* with the IGT that an active complaint is, or could be, on foot that actually prevents the disclosure of the debt information, i.e. the taxpayer is no longer within the 'class of entities' under paragraph 355-72(1)(c) of the Bill.

1.17 Taxpayers should be informed of their right and allowed time to lodge a complaint with the IGT as explained below. Where they do lodge a complaint with the IGT, the Bill's requirement to *consult* and the LI requirement to *confirm* should be appropriately amended to make it clear that the ATO should await the outcome of the IGT investigation and duly consider the IGT findings in deciding whether to proceed with the disclosure to CRBs.

1.18 Where affected taxpayers make no complaint to the IGT within the 21 day period and the ATO *confirms* this with the IGT after seven days have elapsed since the expiration of the notice period, the disclosure may proceed. The same outcome results where the IGT complaint investigation is completed with no adverse finding with respect to the disclosure being made. However, if the IGT does raise concerns, the ATO should consider them in deciding whether to proceed with the disclosure.

#### **Example 2 - Complaint made to the IGT following the ATO's written notice**

A company incurs a tax debt and does not take action to address the debt. After 90 days, the ATO considers disclosing the company's tax debt to a CRB. The ATO issues a written notice of its intention to disclose the company's tax debt information to a CRB, including the company's avenue to lodge a complaint about the proposed disclosure to the IGT.

After 21 days has passed of the notice issuing, the ATO checks with the IGT whether the company has made a complaint to the IGT. The IGT confirms that there is a relevant IGT investigation on foot. Accordingly, the taxpayer is not within the class of entities set out in the LI.

The ATO does not proceed with disclosure of the taxpayer's information and awaits the completion of the IGT investigation.

### Example 3 – Complaint made to the IGT and IGT makes a determination

Following on from Example 2, the IGT completes its investigation of the company's complaint about the disclosure of their tax debt information.

The IGT finds that the company had not received the ATO's debt-related correspondence and was not aware of their debt obligations. Whilst the company does not wish to dispute the debt, the IGT makes a determination that the ATO should provide the company with additional time to address their tax debt.

Given the circumstances, the ATO agrees to provide the company with an additional 3 weeks to negotiate a payment arrangement before again contemplating disclosure of the company's tax debt information to a CRB.

## COMMISSIONER REQUIREMENT TO PROVIDE A NOTICE TO THE AFFECTED TAXPAYER

1.19 Subsections 355-72(2) and (3) of the Bill requires the Commissioner to give affected taxpayers notice in writing and for that notice to be served on the taxpayer. The particular items that the Commissioner is required to provide within the notice are also listed in subsection 355-72(3) of the Bill. The period for the notice has been discussed previously and is found in subparagraph 355-72(1)(e)(ii) of the Bill.

1.20 Relevantly, a key requirement in this notice is that the Commissioner should explain to the affected taxpayer how to make a complaint in relation to the proposed disclosure. The term 'complaint' is not defined within the *Taxation Administration Act 1953* (TAA 1953) or Bill. Furthermore, the Bill does not expressly require the Commissioner to explain to whom a complaint may be made. However, the EM states that an entity who 'has been given a notification of the Commissioner's intention to disclose their tax debt information and is not satisfied with the complaint mechanisms provided by the ATO may wish to lodge a complaint with the Inspector-General of Taxation'.<sup>6</sup>

1.21 The absence of an express reference to the IGT in paragraph 355-72(3)(d) of the Bill has the potential to stymie the policy intent of providing an independent assurance as a 'check and balance' on the process. Specifically, affected taxpayers may lodge a complaint with the ATO complaint unit in the first instance and may await the outcome of that complaint before lodging a complaint with the IGT. This may result in complaints not being lodged with the IGT within the 21 day period stipulated in subparagraph 355-72(1)(e)(ii) of the Bill.

1.22 Accordingly, paragraph 355-72(3)(d) of the Bill should be amended to include an express reference to the IGT as the party to whom the affected taxpayer may

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<sup>6</sup> Treasury, Treasury Laws Amendment (Tax Transparency) Bill 2018, Exposure Draft Explanatory Materials, at [1.63].

complain in order to ensure that they are not prevented from accessing the intended independent assurance or safeguard.

## **Service of notice**

1.23 As noted in the section above, the Bill requires the Commissioner to serve written notice on an entity concerning the intended disclosure of their tax debt information.

1.24 The EM explains that service of the notice may be in accordance with Division 4 of the *Taxation Administration Regulations 2017* and section 28A of the *Acts Interpretations Act 1901*. It follows that service of the notice under the Bill would be considered effective where it has been issued in circumstances similar to those for other tax debt related documents.

1.25 The IGT has recently examined concerns regarding certain ATO correspondence not reaching taxpayers or their advisors with the result being that taxpayers may be left unaware of their obligations and not expecting ATO debt recovery action when their tax debts remain outstanding.<sup>7</sup> The major underlying cause was found to be the interaction between the ATO's accounting systems. Accordingly, as a longer term goal, the IGT had recommended the ATO consider using a single integrated accounting system for administering the income tax and PAYG instalments regimes, and in the interim, a number of other recommendations were made aimed at improving the existing processes.

1.26 In the context of the TBTD measures, given that service may depend on the type of taxpayer entity, for example service to a company<sup>8</sup> would differ from that for a sole trader or business partnership, it is recommended that the ATO consider a differentiated approach. For example, personal service may be considered in certain cases to ensure prompt and effective service and minimise any potential further delay.

## **EFFECTIVE ENGAGEMENT**

1.27 The Bill and LI provide an additional exemption for taxpayers from having their tax debt information being disclosed if they are effectively engaging with the Commissioner to manage their tax debt. The term 'effective engagement' is specifically defined in paragraph 7(3) of the LI to include:

- an arrangement entered into with the Commissioner to pay their tax debt by instalments (known as 'payment arrangements') under section 255-115 in schedule 1 to the TAA 1953 and the entity is complying with the arrangement;
- the entity has objected against a taxation decision (within the meaning of section 14ZL of the TAA 1953) to which the tax debt relates; or

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<sup>7</sup> IGT, *Review into aspects of the pay as you go instalments system* (2018).

<sup>8</sup> For example, service of documents to a company may be achieved in accordance with section 109X of the *Corporations Act 2001*.

- the entity, under section 14ZZ of the TAA 1953, applied to the Administrative Appeals Tribunal for review or appealed to the Federal Court of Australia against a decision made by the Commissioner to which the tax debt relates.

1.28 Taxpayers may, however, consider that they are effectively engaging with the Commissioner by other means such as requesting a payment deferral,<sup>9</sup> providing a security<sup>10</sup> towards a debt or seeking release from the debt due to serious financial hardship.<sup>11</sup> Accordingly the definition of effective engagement in the LI should be expanded from the current limited list to a non-exhaustive list which includes these additional courses of action that the taxpayer might take.

1.29 Another challenge is 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,<sup>12</sup> 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.

1.30 Since the *Debt Collection* review, the IGT continues to receive complaints concerning difficulties in negotiating payment arrangements with the ATO. Accordingly, it is expected that taxpayer concerns may arise with respect to 'effectively engaging' with the Commissioner and require remedy through the IGT's complaint handling service. Such situations further support the earlier IGT recommended improvements.

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<sup>9</sup> *Taxation Administration Act 1953* sch 1 s 255-10.

<sup>10</sup> *Taxation Administration Act 1953* sch 1 subdiv 255-D.

<sup>11</sup> *Taxation Administration Act 1953* sch 1 pt 4.50.

<sup>12</sup> IGT, *Debt Collection* (2015).