Australian Government

Australian Small Business and Family Enterprise Ombudsman

15 August 2019

Committee Secretary
Senate Economics Legislation Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

***via email: economics.sen@aph.gov.au***

Dear Sir/Madam

**Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019**

While the Bill contains a number of proposed amendments, we restrict our comments to what we believe are the critical issues with two key measures:

***Schedule 3 – Limiting deductions for vacant land***

We do not support the current drafting in the Bill.

First, the current wording preferences corporate structures and arbitrarily denies tax deductions for non-corporate small businesses (almost two-thirds of small business is conducted via non-corporate structures) and also self-managed superannuation funds.

Second, there is apparent denial of deductions in respect of a number of legitimate holdings of vacant land. To evidence this point we provide the following examples in an agricultural context noting that they can also apply beyond that particular context:

1. A farmer leases land held via a separate title by way of agistment to an unrelated entity. Presumably, the lease would mean that the land is not "available for use" and deductions are denied (although potentially forming part of the cost base for capital gains tax purposes on ultimate disposal), despite the agistment income being assessable.
2. Land is held for future business expansion (whether or not as part of a separate title) but that land is contaminated and requires remediation (or time left fallow) in order to become available for use. Presumably, deductibility would be denied until remediation processes are completed. Further, there is a real question over the deductibility of remediation in such instances (although again they may form part of the cost base on ultimate disposal).
3. A dairy farmer has a parcel of land that is used for grazing and a structure for milking. However, part of that land is situated on an escarpment that cannot be used for dairy or building purposes. Whether or not the land is on a single title, it appears that deductions would be denied for holding costs of the land relating to the escarpment. A similar example could include a green corridor (rather than escarpment).

For the Bill to be effective, it needs to include drafting that makes its application clear and appropriate (and not use the Explanatory Memorandum (EM) to provide such clarity). For example, the draft Bill uses the words "to the extent that land is in use" to indicate that use and non-use across a single title may be apportioned. However, the EM at paragraph 3.15 then goes on to state that "for most losses and outgoings relating to holding land, this will be the land covered by a single property title as the loss or outgoing relates to that title". There is no apparent basis for this proposition in the proposed legislation, whilst the EM then goes on (at paragraph 3.17) to confuse

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the issue by stating that "in other cases a loss or outgoing may relate to only part of the land covered by a title or to land covered by multiple titles".

To some degree, the answer to the apportionment question would be answered by the degree to which a structure is able to be seen to "dominate" the land within, say, a single title. This issue is referred to, for example, in paragraph 3.18 of the EM but without any clear guidance or ultimate resolution (which again should be in the Bill itself). Paragraph 3.34 of the EM refers explicitly to the apportionment of land, presumably in respect of mixed use on a single title.

A second example of the need for clearer drafting is that neither the legislation nor the EM provide sufficient guidance on what "available for use" means. At paragraph 3.31, the EM refers to vacant land held by a property developer as being available for use and at paragraph 3.32 refers to land otherwise held "for future use". However, there is a real question about when land is "available for use" that may include when it, say, requires approvals for rezoning or subdivision in order to be available for development. Although land might be held for future expansion, the expenditure to rezone and subdivide would commonly not be expended until needed. Similarly, there are questions raised in the examples above concerning where land requires remediation.

***Schedule 5 – Disclosure of business tax debts***

We acknowledge that the consultation in relation to the disclosure of business tax debts has greatly informed the proposed operation of the amendments. However, various understandings reached in that consultation on procedural conditions and safeguards are not reflected in the legislation (although some are reflected in the EM). We understand from the EM (and reflected in part by the terms of the Bill) that these will be covered by a future legislative instrument to be issued by the Treasurer. However, given the serious impact on small business of the disclosure to credit reporting bureaus (recognised in paragraph 5.17 of the EM and the detailed privacy law coverage in the EM), we need to be equally serious to ensure that all appropriate safeguards are in place within the legislation itself to properly reflect Parliament's intention. In this light we make the following comments:

1. Paragraph 5.6 of the EM refers only to conditions and safeguards to "establish whether a taxpayer can be subject to the new disclosure arrangements" and not how the system will operate once disclosure is made (also referenced in paragraph 5.8 of the EM). Further, paragraph 5.12 of the EM states that "it is expected that tax debt amounts that are being disputed in various forums, and tax debt amounts that are being paid under a payment arrangement, will not be disclosed." However, this seemingly applies only to the initial disclosure of information. Should a tax debt at any time become disputed, a payment plan is entered into or otherwise a correction to the tax debt is made and reported to the bureau, there should be an obligation on the bureau (and that this is reflected in the Bill) that the bureau corrects the data and permanently expunges references in its systems to the previously reported tax debts.
2. Noting again that many critical issues of governance will be addressed through the proposed future legislative instrument, the precise method of appropriate notification prior to disclosure being made (eg. whether the Commissioner will seek to contact a taxpayer by phone etc.) are not specified. This will be a critical issue to be addressed in the instrument especially given that "service" in terms of the Bill could be on an address (including an electronic address) that has not been updated.
3. The Bill's amendment to subsection 355-72(e)(ii) that allows 21 days' notice of disclosure is insufficient for a small business to receive, take advice and respond appropriately to a disclosure notice. We recommend that this be changed to at least 45 days' notice.
4. The proposed amendment to subsection 355-72(2)(b) in its current form suggests that a taxpayer will not be notified when information already reported to a credit reporting bureau is updated,

corrected or confirmed. It is imperative for small businesses to have the Australian Taxation Office (ATO) notify them of each and every change to data reported to a bureau. Small business taxpayers should not carry the burden of checking on the ATO and the bureaus to ensure that data has been appropriately corrected and/or expunged.

As already stressed, the issue of expungement of previously reported data is so fundamental that it should not be left to a future instrument or otherwise through Commissioner and credit reporting bureau guidance or practice. Part of setting aside taxpayer secrecy is that it should be limited precisely to the issue being targeted (ie. encouraging engagement with the Commissioner). Since it is directly against the commercial interests of credit reporting bureaus to expunge data, the proposed Bill should be amended to clearly lift taxpayer secrecy only for the intended purpose and return the secrecy once the objective is achieved. Further, there remains no clear indication how compliance with a directive of the Commissioner (eg. to remove data) will be monitored. The ATO should be properly assured of the integrity of each of the bureau's systems to expunge both current and all historical reporting of data immediately upon the payment or other resolution of a tax debt.

Accordingly and in addition to our other recommended drafting changes, the Bill must clearly specify that credit reporting bureaus are under a positive obligation to immediately amend their reports when directed by the Commissioner and that the prior record be completely expunged.

Lastly, given the impact that the proposed amendments are likely to have on impacted small businesses, a post implementation review of the amendments should be conducted within two years of the enabling legislation to ensure that the rules operate as intended.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact [redacted] on [redacted] or by email to [redacted]

Yours sincerely

[redacted]

**Kate Carnell AO**
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