



Australian Government  

---

Inspector-General of Taxation  

---

Taxation Ombudsman

SUBMISSION TO:

THE SENATE ECONOMICS LEGISLATION  
COMMITTEE

&

THE TREASURY

DISCLOSURE OF BUSINESS TAX DEBTS

By the Inspector-General of Taxation and Taxation Ombudsman

15 August 2019

# CONTENTS

|   |          |
|---|----------|
| <b>CONTENTS .....</b>   | <b>i</b> |
| <b>Executive Summary .....</b>  | <b>1</b> |
| Bill No. 1: .....   | 1        |
| Exposure Draft Declaration: .....   | 2        |
| Terms of Reference .....  | 2        |
| Senate Economics Legislation Committee - Treasury Laws Amendment (2019 Tax Integrity And Other Measures No. 1) Bill 2019 [Provisions] .....   | 2        |
| The Treasury - Disclosure of Business Tax Debts .....   | 2        |
| The importance of the reforms .....   | 3        |
| <b>Introduction .....</b>   | <b>4</b> |
| <b>Section A—Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 ....</b>   | <b>5</b> |
| Issue 1—section 355-72 does not clearly describe the 2-step requirement for the ATO to ‘confirm’ and ‘consult’ with the IGTO .....  | 5        |
| Reasons and explanation .....   | 5        |
| Recommendation 1 .....  | 6        |
| Issue 2—subsection 355-72(2) notification requirement excludes notification to tax practitioner representatives .....   | 6        |
| Reasons and explanation .....   | 6        |
| Recommendation 2 .....  | 6        |
| Issue 3—paragraph 355-72(3)(c) should be amended to require the notice to provide a detailed breakdown of the outstanding debt including amounts of penalties and accruing interest ..... | 7        |
| Reasons and explanation .....   | 7        |
| Recommendation 3 .....  | 7        |
| Issue 4—paragraph 355-72(3)(d) does not require the notification to explain that a complaint must be made to the IGTO, not the ATO or other bodies .....                                  | 7        |
| Reasons and explanation .....   | 8        |
| Recommendation 4 .....  | 8        |
| Issue 5—subsection 355-72(3) does not require the notification to explain how a taxpayer’s debt may be excluded from the calculation of total debts .....                                 | 9        |
| Reasons and explanation .....   | 9        |
| Recommendation 5 .....  | 9        |
| Issue 6—paragraph 355-72(3)(e) should require more reliable modes of service .....  | 10       |
| Reasons and explanation .....   | 10       |
| Recommendation 6 .....  | 10       |
| Issue 7—subparagraph 355-72(1)(e)(ii) 21 day notice period for taxpayers to effectively engage is too short .....   | 11       |
| Reasons and explanation .....   | 11       |
| Recommendation 7 .....  | 11       |

|   |           |
|---|-----------|
| Issue 8—paragraph 355-72(1)(e) requirement for the ATO to consult with the IGTO is unclear whether consultation must only occur at the expiry of the 21 day notification period ..... | 12        |
| Reasons and explanation .....   | 12        |
| Recommendation 8 .....  | 12        |
| Issue 9—subparagraph 355-72(1)(e)(ii) is unclear as to the requirement for the ATO to consult with the IGTO on the disclosure.....  | 13        |
| Reasons and explanation .....   | 13        |
| Recommendation 9 .....  | 13        |
| Issue 10—legislation does not allow the IGTO to independently verify proposed disclosures, as expected by the community, absent an investigation .....                                | 13        |
| Reasons and explanation .....   | 14        |
| Recommendation 10 .....   | 14        |
| Issue 11—the Bill No. 1 and the Exposure Draft Declaration should prevent ATO automated and bulk confirmation and consultation processes with the IGTO .....                          | 15        |
| Reasons and explanation .....   | 15        |
| Recommendation 11 .....   | 16        |
| Issue 12— the Bill No. 1 does not provide for specific taxpayer compensation in the event of harm as a result of inaccurate or inappropriate disclosure by the ATO .....              | 16        |
| Reasons and explanation .....   | 16        |
| Recommendation 12 .....   | 17        |
| <b>Section B—Tax Administration (Tax Debt Information Disclosure) Declaration 2019 .....</b>  | <b>17</b> |
| Issue 13—Section 6 heading reference to ‘taxpayers carrying on a business or similar venture’ is not a requirement in the section .....   | 18        |
| Reasons and explanation .....   | 18        |
| Recommendation 13 .....   | 18        |
| Issue 14—paragraph 6(1)(a) is unclear whether registration in the ABR is prima facie evidence that a taxpayer is entitled to be a registered entity .....                             | 19        |
| Reasons and explanation .....   | 19        |
| Recommendation 14 .....   | 19        |
| Issue 15—paragraph 6(1)(b) interaction between ‘one or more tax debts totalling \$100,000’ and ‘due and payable for more than 90 days’ is unclear .....                               | 20        |
| Reasons and explanation .....   | 20        |
| Recommendation 15 .....   | 20        |
| Issue 16—paragraph 6(1)(b) 90-day outstanding debt period policy intent is unclear given the paragraphs 6(2)(b) to (e) disputed debt exclusion criteria.....                          | 20        |
| Reasons and explanation .....   | 20        |
| Recommendation 16 .....   | 23        |
| Issue 17—subsection 6(2) debt exclusions should be expanded to require additional exclusions .....  | 23        |
| Reasons and explanation .....   | 23        |
| Recommendation 17 .....   | 24        |

|                 |    |
|-----------------|----|
| Glossary.....   | 25 |
| End Notes ..... | 26 |

## EXECUTIVE SUMMARY

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) welcomes the opportunity to make these submissions to the Senate Economics Legislation Committee's (Committee) inquiry into the provisions of the *Treasury Laws Amendment (2019 Tax Integrity And Other Measures No. 1) Bill 2019* (Committee Inquiry) and to the Treasury's consultation on the exposure draft *Taxation Administration (Tax Debt Information Disclosure) Declaration 2019* (Treasury Consultation).

The IGTO provides a single submission on the proposed disclosure of business tax debts measures given the interrelated subject matter of the Committee Inquiry and the Treasury Consultation. It would be difficult to fully appreciate the nature of the disclosure of business tax debts measures without taking a holistic perspective of the *Treasury Laws Amendment (2019 Tax Integrity And Other Measures No. 1) Bill 2019* (Bill No. 1) and the exposure draft *Taxation Administration (Tax Debt Information Disclosure) Declaration 2019* (Exposure Draft Declaration) which gives effect to one of the provisions in Bill No. 1. Whilst the submission is segmented into sections focussed on Bill No. 1 and the Exposure Draft Declaration, cross reference is made where necessary.

The IGTO has also had regard to the Explanatory Memorandum to Bill No. 1 (Explanatory Memorandum) and the Explanatory Statement to the Exposure Draft Declaration (Explanatory Statement) in preparing this submission.

Overall, the IGTO makes 17 recommendations aimed at improving the intended operation of Bill No. 1 and the Exposure Draft Declaration for consideration by the Committee or the Treasury. These may be summarised as follows:

### Bill No. 1:

1. section 355-72 should clearly describe the 2-step requirement for the Australian Taxation Office (ATO) to 'confirm' and 'consult' with the IGTO;
2. subsection 355-72(2) notification requirement should include notification to tax practitioner representatives;
3. paragraph 355-72(3)(c) should be amended to require the notice to provide a detailed breakdown of the outstanding debt including amounts of penalties and accruing interest;
4. paragraph 355-72(3)(d) should require the notification to explain that a complaint must be made to the IGTO, not the ATO nor other bodies;
5. subsection 355-72(3) should require the notification to explain how a taxpayer may effectively engage with the ATO and have their debt excluded from the calculation of total debts;
6. paragraph 355-72(3)(e) should require more reliable modes of service;
7. subparagraph 355-72(1)(e)(ii) 21 day notice period for taxpayers to effectively engage is too short in the circumstances and should be extended;

8. paragraph 355-72(1)(e) requirement for the ATO to consult with the IGTO is unclear as to whether consultation must only occur at the expiry of the 21 day notification period and should be clarified;
9. subparagraph 355-72(1)(e)(ii) is unclear as to the requirement for the ATO to consult with the IGTO on the disclosure and should be clarified;
10. legislative amendments are required to allow the IGTO to independently verify proposed disclosures to CRBs, as expected by the community, absent an investigation;
11. the Bill No. 1 and the Exposure Draft Declaration should prevent ATO automated and bulk confirmation and consultation processes with the IGTO; and
12. the Bill No. 1 should provide for specific taxpayer compensation in the event of harm as a result of inaccurate or inappropriate disclosure by the ATO;

### Exposure Draft Declaration:

13. the section 6 heading reference should be consistent with the requirements in the section — ‘taxpayers carrying on a business or similar venture’ is not an existing requirement in the section;
14. paragraph 6(1)(a) should make clear if registration in the Australian Business Register (ABR) is prima facie evidence that a taxpayer is entitled to be a registered entity;
15. paragraph 6(1)(b) interaction between ‘one or more tax debts totalling \$100,000’ and ‘due and payable for more than 90 days’ should be clarified;
16. paragraph 6(1)(b) 90-day outstanding debt period policy intent is unclear given the paragraphs 6(2)(b) to (e) regarding disputed debt exclusion criteria and should be clarified; and
17. subsection 6(2) debt exclusions should be expanded to require additional exclusions.

We trust these submissions and recommendations are useful and instructive.

## TERMS OF REFERENCE

### Senate Economics Legislation Committee - Treasury Laws Amendment (2019 Tax Integrity And Other Measures No. 1) Bill 2019 [Provisions]

*On 25 July 2019, the Senate referred the provisions of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 to the Economics Legislation Committee for inquiry and report by 5 September 2019.<sup>1</sup>*

### The Treasury - Disclosure of Business Tax Debts

*On 24 July 2019, the Government introduced legislation which gives the Australian Taxation Office (ATO) the ability to disclose the tax debt information of businesses who do not pay their tax debts to credit reporting bureaus in certain circumstances.*

*The Government is seeking the community's views on the exposure draft legislative instrument which sets out the class of business whose tax debt information can be disclosed. The legislative instrument only allows the ATO to disclose this information when certain conditions and safeguards are met, including ensuring the entity has not entered into a payment arrangement with the ATO, does not have a complaint with the Inspector-General of Taxation about the disclosure of debt information and has total tax debts of at least \$100,000 which has been payable for more than 90 days.<sup>2</sup>*

## THE IMPORTANCE OF THE REFORMS

The IGTO understands the object of the disclosure of business tax debt measures is:

- to place tax debts on a similar footing as other debts, thereby strengthening the incentives for businesses to pay their debts in a timely manner and effectively engage with the ATO to avoid having their tax debt information disclosed; and
- reduce unfair financial advantage obtained by businesses that do not pay their tax on time and contribute to more informed decision making within the business community by enabling credit providers and businesses to make a more complete assessment of the credit worthiness of a business.<sup>3</sup>

Importantly, the IGTO also recognises the new role intended for the office in providing an independent safeguard to the operation of the measures. The community would expect the IGTO to provide independent assurance that the ATO is not erroneously sending disclosure notices to taxpayers and to mitigate against erroneous, inaccurate or otherwise inappropriate disclosure of a taxpayer's debt information to Credit Reporting Bureaus (CRB). The IGTO should also be adequately resourced to perform this new role.

The IGTO makes 17 recommendations aimed at improving the administration of the measures outlined and, in particular, the safeguards for taxpayers that may be subject to the proposed measures.

### Contacts

Please do not hesitate to contact myself (+61 2 8239 2125) or Jarrod Joseph, Director (+61 2 8239 2102) should you wish to discuss any of these matter further.

Karen Payne  
Inspector-General of Taxation and Taxation Ombudsman  
**15 August 2019**

# INTRODUCTION

The IGTO welcomes the opportunity to make submissions to the Committee Inquiry into the provisions of the Bill No. 1 and the Treasury Consultation on the Exposure Draft Declaration.

On 24 July 2019, the Government introduced the Bill No. 1 into Parliament which would give the ATO the ability to disclose the tax debt information of businesses who do not pay their tax debts to CRBs in certain circumstances. The same day, the Treasury opened its consultation on the Exposure Draft Declaration which sets out the proposed class of businesses whose tax debt information can be disclosed.

On 25 July 2019, the Senate referred the provisions of the Bill No. 1 to the Committee for inquiry. Amongst other things, the Bill No. 1 contains the enabling legislation of the disclosure of business tax debt measures and gives effect to the Exposure Draft Declaration.

Accordingly, the IGTO provides a single submission on the proposed disclosure of business tax debt measures given the interrelated subject matter of the Committee Inquiry and the Treasury Consultation. It would be difficult to fully appreciate the nature of the disclosure of business tax debts measures without taking a holistic perspective of the Bill No. 1 and the Exposure Draft Declaration.

The IGTO has also had regard to the Explanatory Memorandum and Explanatory Statement in preparing this submission.

The submission is segmented into the following two broad sections:

- Section A—*Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019; and*
- Section B—*Tax Administration (Tax Debt Information Disclosure) Declaration 2019.*

Whilst each section is focussed on the Bill No. 1 and the Exposure Draft Declaration, cross reference is made where necessary.



## SECTION A—TREASURY LAWS AMENDMENT (2019 TAX INTEGRITY AND OTHER MEASURES NO. 1) BILL 2019

### ISSUE 1—SECTION 355-72 DOES NOT CLEARLY DESCRIBE THE 2-STEP REQUIREMENT FOR THE ATO TO ‘CONFIRM’ AND ‘CONSULT’ WITH THE IGTO

Our construction of section 355-72 of the Bill No. 1 is that a two (2) step process is contemplated.

- a. Firstly, the ATO must ‘confirm’ whether an entity is within the declared class of entities per the Exposure Draft Declaration — by confirming with the IGTO that there is no current complaint; and then
- b. Secondly, 21 days after issuing a notice of intended disclosure, the ATO must then ‘consult’ with the IGTO on the proposed disclosure.

We submit that the legislation more clearly set out the 2-step requirement for the ATO to confirm and consult with the IGTO. Importantly, we consider that the ATO should consult with the IGTO just after the 21 days lapse — to ensure there is no complaint to IGTO in the intervening 21 day period. Further details on the two-step process are explored in Issues 9 and 10.

#### Reasons and explanation

The IGTO’s construction of the requirements, as noted in the IGTO’s previous submission,<sup>4</sup> is that, per paragraph 355-72(1)(c), one of the first steps the ATO must take is to determine whether a taxpayer is within the declared class of entities as set out in the Exposure Draft Declaration.<sup>5</sup>

Amongst other things, a taxpayer is within the declared class of entities if the taxpayer does not have an active complaint with the IGTO concerning the *disclosure of the debt* or the Commissioner of Taxation (Commissioner) does not become aware of such a complaint after taking reasonable steps to *confirm* whether the IGTO has such a complaint.

However, tax debts are to be excluded from the calculation of total tax debts where the taxpayer has an active complaint *in relation to the debt* with the IGTO and the Commissioner becomes aware of such a complaint after taking reasonable steps to *confirm* whether the IGTO has such a complaint.

Accordingly, it would be expected that the ATO will undertake to confirm whether there is a complaint in existence of any of the above complaint types with the IGTO to first determine if a taxpayer is within the class of entities whose tax debt information may be disclosed to CRBs. Only after determining that a taxpayer is within the declared class of entities should the ATO issue the taxpayer with a notice of intended disclosure per subsections 355-72(2) and (3).

After 21 days has elapsed from the day the ATO issued a taxpayer with a notice of intended disclosure should the ATO then consult with the IGTO on the disclosure per paragraph 355-72(1)(e).

However, when comparing the wording of paragraph 355-72(1)(e) with the wording in the Exposure Draft Declaration, it is unclear whether the ATO would be required to receive confirmation from the IGTO or merely rely on its own internal information. This matter is considered under Issue 9.

### Recommendation 1

**The IGTO recommends that section 355-72 of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 be revised to more clearly set out the 2-step requirement for the ATO to confirm and consult with the IGTO — including that the IGTO must be consulted at the end of the 21 days (as well).**

## ISSUE 2—SUBSECTION 355-72(2) NOTIFICATION REQUIREMENT EXCLUDES NOTIFICATION TO TAX PRACTITIONER REPRESENTATIVES

Subsection 355-72(2) of the Bill No. 1 only requires that taxpayers be notified that their information may be disclosed to CRBs. We submit that the provision be amended to also include notification to taxpayer representatives where relevant.

### Reasons and explanation

The Bill No. 1 only requires service of the notice of intended disclosure to the taxpayer. However, where taxpayers have engaged the services of a tax practitioner representative, the representative may be unaware of the intended disclosure. Moreover, without such notice, the representative may be unaware that they could assist their client or otherwise have their client or the client's debt excluded from the declared class of entities — for example, by assisting their client to enter into a payment arrangement.

Accordingly, the IGTO considers that it is important that any taxpayer representatives are also notified of the intended disclosure of their client's information to CRBs.

### Recommendation 2

**The IGTO recommends that subsection 355-72(2) of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 be amended to also require notification to any tax practitioner representative.**

## ISSUE 3—PARAGRAPH 355-72(3)(C) SHOULD BE AMENDED TO REQUIRE THE NOTICE TO PROVIDE A DETAILED BREAKDOWN OF THE OUTSTANDING DEBT INCLUDING AMOUNTS OF PENALTIES AND ACCRUING INTEREST

Paragraph 355-72(3)(c) only requires the ATO to provide in the notice of intended disclosure the amount of any tax debts payable by the taxpayer at the time the notice is given by the ATO. We submit that the provision should be amended to require the notice to set out a detailed breakdown of all debts and necessary details for taxpayer to understand the particular debt amounts subject to the intended disclosure, including penalties and interest.

### Reasons and explanation

Paragraph 6(1)(b) of the Exposure Draft Declaration provides that the taxpayer must have one or more debts, the total of which is at least \$100,000.

A taxpayer may have multiple primary debts, some of which also may have penalties attached. The situation is compounded where the primary debt and penalty amounts have been outstanding for different periods, each incurring a different amount of interest charges.<sup>6</sup> In such a situation, it would be difficult for taxpayers to understand how all the primary debts, penalties and accruing interest total to an amount of at least \$100,000. Indeed, such information would be difficult for taxpayers to understand due to the different systems the ATO maintains for income tax and running balance account purposes. It would be of assistance to taxpayers and help them understand their debts which are the subject of the intended disclosure notice to have a detailed breakdown of the total debt amount. For example, it would assist them to determine whether to enter into a payment arrangement, formally dispute specific debts/penalties or lodge a complaint with the IGTO.

Accordingly, the IGTO considers that paragraph 355-72(3)(c) of the Bill No. 1 be amended to require a detailed breakdown of all debts — including primary amounts, penalties and accruing interest amounts on the intended disclosure notice.

### Recommendation 3

**The IGTO recommends that paragraph 355-72(3)(c) of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 be amended to require a detailed breakdown of all debts, penalties and accruing interest on the intended disclosure notice.**

## ISSUE 4—PARAGRAPH 355-72(3)(D) DOES NOT REQUIRE THE NOTIFICATION TO EXPLAIN THAT A COMPLAINT MUST BE MADE TO THE IGTO, NOT THE ATO OR OTHER BODIES

Paragraph 355-72(3)(d) of the Bill No. 1 does not require the ATO's notification of intended disclosure to state that a complaint should be made to the IGTO, not the ATO or other bodies, in order for the taxpayer to be excluded from the declared class of entities or the debt to be excluded from the total calculation of debt. We submit that the provision be amended to require the notice to explain that a complaint must be made to the IGTO to receive the related protections.

### Reasons and explanation

Paragraph 355-72(3)(d) of the Bill No. 1 requires the content of the notice of intended disclosure to include how to make a complaint in relation to the proposed disclosure.

However, as noted in the IGTO's previous submission,<sup>7</sup> and as per the Exposure Draft Declaration, only a complaint made to the IGTO will provide taxpayers with protection from disclosure and independent investigation of their concerns. As noted earlier, a complaint made to the ATO or other bodies, such as the Privacy Commissioner who may investigate credit reporting matters, will not provide a basis for exclusion of the debt. Taxpayers would expect to be provided with such information in the notice of intended disclosure.

Accordingly, we submit that paragraph 355-72(3)(d) be amended to require the notice to explain that a complaint must be made to the IGTO, not the ATO or other bodies, and the related protections in this regard.

### Recommendation 4

**The IGTO recommends that paragraph 355-72(3)(d) of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 be amended to require the notice of intended disclosure to explain that a complaint must be made to the IGTO, not the ATO or other bodies, and the related protections in this regard.**

## ISSUE 5—SUBSECTION 355-72(3) DOES NOT REQUIRE THE NOTIFICATION TO EXPLAIN HOW A TAXPAYER’S DEBT MAY BE EXCLUDED FROM THE CALCULATION OF TOTAL DEBTS

Subsection 355-72(2) of the Bill No. 1 does not require the notice of intended disclosure to explain how a taxpayer’s debt may be excluded from the calculation of total debts for the purposes of determining whether the taxpayer is within the declared class of entities per the Exposure Draft Declaration. We submit that subsection 355-72(3) be amended to require the notice to explain how a taxpayer may have their debt excluded from the calculation of total debts.

### Reasons and explanation

Subsection 355-72(3) of the Bill No. 1 sets out the required content of a notice of intended disclosure. The section does not require the notice to explain the methods by which a taxpayer’s debt may be excluded from the calculation of total debts for the purposes of determining whether the taxpayer is within the declared class of entities per the Exposure Draft Declaration.

Whilst an explanation of this nature is envisaged in the Explanatory Memorandum,<sup>8</sup> there is no requirement in the text of the Bill No. 1. Accordingly, we submit that subsection 355-72(3) be amended to specifically require notices of intended disclosure to explain how a taxpayer may effectively engage with the ATO and have their debt excluded from the calculation of total debts.

### Recommendation 5

**The IGTO recommends that subsection 355-72(3) of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 be amended to require notices of intended disclosure to explain how a taxpayer may effectively engage with the ATO and have their debt excluded from the calculation of total debts for the purposes of determining whether the taxpayer is within the declared class of entities.**

## ISSUE 6—PARAGRAPH 355-72(3)(E) SHOULD REQUIRE MORE RELIABLE MODES OF SERVICE

Paragraph 355-72(3)(e) of the Bill No. 1 only requires the notice of intended disclosure to be served on taxpayers. We submit that the provision be amended to specifically require service by registered post or personal service.

### Reasons and explanation

Paragraph 355-72(3)(e) of the Bill No. 1 only requires the notice of intended disclosure be served on taxpayers. As noted in the IGTO's previous submission, the IGTO has received complaints and has previously investigated concerns where, despite best endeavours, ATO correspondence had not reached a taxpayer or their representative. The result being that the taxpayer is unaware of the obligations and not expecting ATO debt recovery action.<sup>9</sup>

Due to the potential for serious adverse financial impacts on taxpayers, it is critical that taxpayers be adequately informed about the Commissioner's intention to disclose their tax debt information to CRBs. Without a taxpayer being informed, one of the main policy aims of 'strengthening the incentives for businesses to pay their debts in a timely manner and effectively engage with the ATO', would be frustrated.

It is appreciated that the Explanatory Memorandum explains that the Commissioner may serve a document on an entity in accordance with the rules set out in Part 2 Division 4 of the *Taxation Administration Regulations 2017* or section 28A of the *Acts Interpretation Act 1901*,<sup>10</sup> which includes the options of service by post or personal service. However, service by ordinary post places the onus on the taxpayer to prove they did *not* receive the notification,<sup>11</sup> rather than requiring the ATO to prove that sufficient service was effected.

In the IGTO's view, the better approach would be for paragraph 355-72(3)(e) to require service by registered post or, as a further secured measure, personal service. Such an approach would be fair and reasonable and would minimise disputes (for example, as to whether the taxpayer was sufficiently notified and had time to consider and take action to prevent disclosure). This approach was supported in the IGTO's previous submission.<sup>12</sup>

Accordingly, we submit that paragraph 355-72(3)(e) be amended to specifically require the notice of intended disclosure to be served by registered post or by personal service.

### Recommendation 6

**The IGTO recommends that paragraph 355-72(3)(e) of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 be amended to require the notice of intended disclosure to be served by registered post or by personal service.**

## ISSUE 7—SUBPARAGRAPH 355-72(1)(E)(II) 21 DAY NOTICE PERIOD FOR TAXPAYERS TO EFFECTIVELY ENGAGE IS TOO SHORT

Subparagraph 355-72(1)(e)(ii) provides that 21 days must pass after the notice of intended disclosure was given to a taxpayer before the ATO may disclose the taxpayer's debt information. We submit that the provision be amended to extend the timeframe to allow taxpayers with sufficient time to effectively engage with the ATO, including lodging a complaint with the ATO, the ATO conducting its investigation, and for the taxpayer to subsequently lodge a complaint with the IGTO if they remain dissatisfied.

### Reasons and explanation

Subparagraph 355-72(1)(e)(ii) provides that 21 days must pass after the notice of intended disclosure was given to a taxpayer before the ATO may disclose their debt information to CRBs.

As observed under Issue 6, the ATO may serve the notice of intended disclosure on a taxpayer by ordinary post which may take up to 4 business days for delivery between metropolitan areas and longer where the taxpayer is in a regional area.<sup>13</sup> Indeed, where all correspondence is by post, particularly where taxpayers are located in regional areas, they may find it difficult to effectively engage with the ATO (e.g. negotiate a payment arrangement) or lodge a complaint with the IGTO, within the 21 day timeframe.

The Explanatory Memorandum also envisages that where a taxpayer lodges a complaint with the ATO after they receive notification of intended disclosure, the ATO will investigate that complaint and, if the taxpayer remains dissatisfied, the taxpayer may lodge a complaint with the IGTO.<sup>14</sup> As the ATO's ordinary service expectation is to resolve complaints within 15 **business days**<sup>15</sup> (or 21 calendar days), it is unlikely that taxpayers would be in a position to lodge a complaint with the IGTO within the 21 day notification period.

Accordingly, we submit that the timeframe in subparagraph 355-72(1)(e)(ii) be extended to provide sufficient time for taxpayers to effectively engage with the ATO, go through the ATO complaint process and lodge a complaint with the IGTO, also taking into account postal timeframes.

### Recommendation 7

**The IGTO recommends that subparagraph 355-72(1)(e)(ii) of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 should be amended to provide sufficient time for taxpayers to effectively engage with the ATO, go through the ATO complaint process and lodge a complaint with the IGTO, also taking into account postal timeframes.**

## ISSUE 8—PARAGRAPH 355-72(1)(E) REQUIREMENT FOR THE ATO TO CONSULT WITH THE IGTO IS UNCLEAR WHETHER CONSULTATION MUST ONLY OCCUR AT THE EXPIRY OF THE 21 DAY NOTIFICATION PERIOD

Paragraph 355-72(1)(e) only requires that the ATO consult with the IGTO and that 21 days have passed after the notice of intended disclosure was given to the taxpayer before the ATO may disclose the taxpayer's debt information. We submit that the provision be amended to clarify that the ATO's consultation with the IGTO should always occur at the expiry of the notification period – so that the taxpayer has every opportunity to lodge a complaint with the IGTO.

### Reasons and explanation

The IGTO's construction of paragraph 355-72(1)(e) is that it requires the ATO to consult with the IGTO and that 21 days have passed after the notice of intended disclosure was given to the taxpayer.

As noted in the IGTO's previous submission, applying this operation of the provision, the Commissioner would be permitted to consult with the IGTO at any time during the 21 day notification period. This could create an anomalous situation where the Commissioner could consult with the IGTO early in the period where the taxpayer has not yet lodged a complaint with the IGTO. In such a situation, the Commissioner would have satisfied the disclosure requirement. However, a taxpayer could still lodge a complaint with the IGTO later within the 21 day period.<sup>16</sup>

Whilst the Explanatory Memorandum explains that 'genuine consultation' with the IGTO 'involves waiting until the end of this 21 day period before requesting a response' from the IGTO, this is not reflected in the text of the provision.<sup>17</sup>

Accordingly, we submit that paragraph 355-72(1)(e) be amended to clarify that ATO consultation with the IGTO must occur at the expiry of the notification period.

### Recommendation 8

**The IGTO recommends that paragraph 355-72(1)(e) of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No.1) Bill 2019 be amended to clarify that ATO consultation with the IGTO must occur at the expiry of the notification period.**



## ISSUE 9—SUBPARAGRAPH 355-72(1)(E)(II) IS UNCLEAR AS TO THE REQUIREMENT FOR THE ATO TO CONSULT WITH THE IGTO ON THE DISCLOSURE

Subparagraph 355-72(1)(e)(ii) only requires the ATO to consult with the IGTO on the disclosure. We submit that this provision to be amended to set out what constitutes ATO ‘consultation’ with the IGTO.

### Reasons and explanation

Subparagraph 355-72(1)(e)(ii) only requires the ATO to consult with the IGTO on the disclosure.

The Explanatory Memorandum, however, sets out that genuine consultation by the ATO with the IGTO includes:

- notifying the IGTO of the ATO’s intention to disclose a taxpayer’s debt information;
- providing the IGTO with reasonable time to verify whether any active complaint from the affected taxpayer has been lodged;
- providing the IGTO with time to consider the disclosure of the particular taxpayer’s information; and
- that the ATO must have regard to any recommendation made by the IGTO about the disclosure.<sup>18</sup>

The above elements as to what constitutes genuine consultation by the ATO with the IGTO, however, is not included in the provision. Accordingly, we submit that greater clarity could be provided if subparagraph 355-72(1)(e)(ii) was amended to specifically include the Explanatory Memorandum genuine consultation elements.

### Recommendation 9

**The IGTO recommends that subparagraph 355-72(1)(e)(ii) of the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 be amended to specifically include the elements of genuine consultation set out in the Explanatory Memorandum.**

## ISSUE 10—LEGISLATION DOES NOT ALLOW THE IGTO TO INDEPENDENTLY VERIFY PROPOSED DISCLOSURES, AS EXPECTED BY THE COMMUNITY, ABSENT AN INVESTIGATION

Neither the Bill No. 1 nor *Inspector-General of Taxation Act 2003* (IGT Act) permit the IGTO to independently verify information to be disclosed outside of an active complaint investigation. We submit that the Bill No. 1 and the IGT Act be amended to allow the IGT to access ATO systems or seek information from the ATO outside of an investigation to independently verify information and the basis for the ATO-proposed disclosure before the ATO discloses it to CRBs.

## Reasons and explanation

The community would expect, as part of the ATO confirmation with the IGTO, that the IGTO independently assures itself that the ATO is not erroneously sending notices to taxpayers who are not within the declared class of entities. However, a situation of information asymmetry exists between the IGTO and the ATO as the IGTO does not have an existing legislative power to access ATO information or systems in these circumstances — that is, outside of an investigation.

Indeed, without such access, it would be difficult for the IGTO to provide independent assurance.

For example, even if the ABR is to serve as *prima facie* evidence of the fact that a taxpayer is a registered entity, as recommended under Issue 14, the online public ABR itself would not provide complete or accurate information for the IGTO to independently verify the criteria set out in subparagraphs 6(1)(a)(i) to (a)(iv) of the Exposure Draft Declaration. Accordingly, further information would be required and, at present, the IGT Act does not empower the IGTO to access ATO systems or request ATO information absent an investigation.<sup>19</sup>

Similar difficulty would arise in respect of the IGTO's ability to independently verify the debt and time thresholds set out in paragraph 6(1)(b) of the Exposure Draft Declaration as well as whether the taxpayer is effectively engaging with the ATO per subsection 6(2) of the Exposure Draft Declaration (e.g. the status of any payment arrangement or dispute).

At present, the IGTO would be unable to independently verify that the taxpayer falls within the declared class of entities if the taxpayer has not lodged a complaint with the IGTO. The IGTO considers that such an approach diminishes the role of the IGTO as an independent check and balance in the process and that this outcome would not align with the community's expectations. The IGTO considers the Bill No. 1 and the IGT Act include express provision for the IGTO to request information and/or directly access ATO systems for the purposes of independently verifying that the taxpayer meets the criteria for the declared class of entity.

### Recommendation 10

**The IGTO recommends that the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 and the Inspector-General of Taxation Act 2003 be amended to include an express provision for the IGTO to request information from the ATO and/or directly access ATO systems for the purposes of independently verifying that a taxpayer meets the criteria for the declared class of entities — including at a time prior to the taxpayer lodging a complaint with the IGTO.**

## ISSUE 11—THE BILL NO. 1 AND THE EXPOSURE DRAFT DECLARATION SHOULD PREVENT ATO AUTOMATED AND BULK CONFIRMATION AND CONSULTATION PROCESSES WITH THE IGTO

The Bill No. 1 and the Exposure Draft Declaration leave open the possibility that the ATO may use automated and bulk confirmation and consultation processes with the IGTO. We submit that the Bill No. 1 and the Exposure Draft Declaration be amended to require the ATO to undertake confirmation and consultation processes with the IGTO on a case-by-case basis in relation to potential disclosures to CRBs.

### Reasons and explanation

The IGTO notes that the debt threshold in paragraph 6(1)(b) of the Exposure Draft Declaration was increased from \$10,000 to \$100,000 for taxpayers to be within the declared class of entities.

Whilst the ATO has not published the potential numbers of taxpayers who have debts over \$100,000, some estimates and inferences may be drawn from the statistics presented in the IGTO's *Review into the ATO's use of Garnishee Notices*. For example, during the last part of the 2016-17 financial year, the ATO focussed its debt collection work towards taxpayers with debts of \$100,000 or more. Over May and June 2017, ATO staff issued 8,357 garnishee notices in approximately 38,000 cases that were considered for such action.<sup>20</sup>

Without ATO confirmation of the number of taxpayers with debts exceeding \$100,000, the above figures may only be a fraction of the potential candidate pool for tax debt disclosures.

Moreover as disclosure of tax debt information may have material consequences for taxpayers, it would not be possible, or desirable, for the ATO to adopt an automated or bulk approach in relation to its confirmation and consultation process with the IGTO. Such an approach could not be practically implemented with the IGTO's current resources and ICT platforms. Furthermore, the potential for bulk consultations exponentially heightens the risks of errors that would adversely impact taxpayers. For example, the commercial consequences could include:

- default on borrowing covenants;
- diminished available working capital and credit;
- reputational issues with suppliers, employees and credit providers; or
- cash flow implications.

The consequences for the taxpayer are significant and accordingly appropriate safeguards are warranted to prevent robotic notices.

Accordingly, in the IGTO's view, the Bill No. 1 and the Exposure Draft Declaration should make clear that any confirmation and consultation undertaken by the ATO with the IGTO be taken on a case-by-case basis only, for the foreseeable future.

Absent a legislative amendment, it is the IGTO's intention to negotiate a process with the ATO that would not allow for bulk consultations or automated processes for the foreseeable future. However, the IGTO's preference is for legislative clarity.

### Recommendation 11

**The IGTO recommends that the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 and the Tax Administration (Tax Debt Information Disclosure) Declaration 2019 be amended to make it clear that confirmation and consultation between the Commissioner of Taxation and the IGTO occur on a case-by-case basis only.**

## ISSUE 12— THE BILL NO. 1 DOES NOT PROVIDE FOR SPECIFIC TAXPAYER COMPENSATION IN THE EVENT OF HARM AS A RESULT OF INACCURATE OR INAPPROPRIATE DISCLOSURE BY THE ATO

The Bill No. 1 does not provide redress or compensation where taxpayers suffer adverse financial impacts as a result of an inappropriate disclosure to CRBs — for example, disclosure which is erroneous, inaccurate or otherwise inappropriate. We submit that the Bill No. 1 include provisions for specific compensation to taxpayers who are adversely affected by erroneous, inaccurate or inappropriate disclosures to CRBs.

### Reasons and explanation

The Bill No. 1 does not provide redress or compensation where taxpayers suffer adverse financial impacts as a result of an inappropriate disclosure to CRBs — for example, disclosure which is erroneous, inaccurate or otherwise inappropriate.

While each CRB will report information provided by the ATO differently in calculating their credit scores and ratings, it is clear that ageing payables information, especially from a trusted source such as the ATO, would be the strongest indicators of default and delinquency to anyone examining the record. However, despite best efforts by the ATO to ensure that its data are free from errors, it would not be possible to guarantee that no erroneous, inaccurate or inappropriate reports would be made to CRBs. Furthermore, errors on the CRB side may also result in erroneous, inaccurate or inappropriate records.

The IGTO expects that contracts or memoranda of understanding between the ATO and the CRBs would include provisions for rectification and remedy, should any errors arise. However, as the taxpayer is a third party to that contract, it is unlikely that any remedy provisions would extend to cover the adverse financial impacts that apply to them.

At present, taxpayers affected by erroneous, inaccurate or inappropriate CRB disclosures could potentially take two courses of action, namely launching legal action to sue for damages or seeking compensation under the Scheme for Compensation for Detriment Caused by Defective Administration (CDDA Scheme).

Both courses of action present difficulties for the taxpayer. In relation to suing for damages, the taxpayer would need to identify an appropriate cause of action and prove their case. Such actions may be lengthy and costly. The CDDA Scheme presents a less formal process for seeking compensation, but given the purely discretionary nature of the scheme and the need to demonstrate ‘defective administration’, the burden of proof for taxpayers may be too high.

In the IGTO’s *Change Program* report, recommendation was made for the ATO to institute specific dedicated compensation schemes to address impacts arising out of the ATO’s enterprise-wide systems upgrade.<sup>21</sup> Similar commentary was also made in the IGTO’s *Taxpayers’ Charter and Taxpayer Protections* review.<sup>22</sup>

In the IGTO’s view, taxpayer confidence in the program would be enhanced if there were specific provisions or processes for compensation and redress in instances where errors adversely impact the financial standing of the taxpayer. Such remedies may include specific compensation schemes or empowering the IGTO, who is tasked with being a check and balance in this process, to award compensation up to specific limits in appropriate circumstances. The IGTO notes the power would be analogous to that exercised by the Australian Information Commissioner for certain breaches of the *Privacy Act 1988*.

## Recommendation 12

**The IGTO recommends that the Treasury Laws Amendment (2019 Tax Integrity and Other Measures No.1) Bill 2019 be amended to include provisions for specific compensation to taxpayers who are adversely affected by erroneous, inaccurate or inappropriate disclosures to CRBs.**

## SECTION B—*TAX ADMINISTRATION (TAX DEBT INFORMATION DISCLOSURE) DECLARATION 2019*

### ISSUE 13—SECTION 6 HEADING REFERENCE TO ‘TAXPAYERS CARRYING ON A BUSINESS OR SIMILAR VENTURE’ IS NOT A REQUIREMENT IN THE SECTION

The heading in section 6 of the Exposure Draft Declaration refers to a declared class of entities being ‘taxpayers carrying on a business or similar venture’.

We submit that this section should be more appropriately headed – for example, ‘Entities registered in the ABR. The question as to whether a taxpayer is or is not carrying on a business is a hard question of fact and not a bright line test. This is also not a requirement in the section. The terminology ‘or similar venture’ is not consistent with tax and related laws. This is also not a requirement in the section.

Headings to a section generally form part of the test for the purposes of statutory interpretation.<sup>23</sup>

A clearer heading could be framed by relying upon the first requirement in the section – that the entity is registered in the ABR.

#### Reasons and explanation

The heading in section 6 of the Exposure Draft Declaration should ideally make reference to at least one of the underlying criteria set out in the section. Paragraph 6(1)(a) which prescribes that ‘the entity is registered in the Australian Business Register’ appears closest to the current description. Accordingly, the heading in section 6 should be aligned with this criteria.

It is appreciated that the concept of ‘carrying on a business’ is a longstanding feature of the income tax law and is relevant to various provisions of general and specific application.<sup>24</sup> However, the concept does not feature in the criteria in section 6 of the Exposure Draft Declaration. It is also not currently used for the purposes of an entitlement to an Australian Business Number (ABN) and registration in the ABR under the *A New Tax System (Australian Business Number) Act 1999* (ABN Act). Therefore, it may cause confusion and should not be used in the heading of section 6.

Moreover, reference to ‘similar venture’ in the section 6 heading also does not feature in the criteria in the section – including paragraph 6(1)(a) of the Exposure Draft Declaration or used for the purposes of registration in the ABR under the ABN Act. Similarly, this phrase should not be used and may also cause confusion with the scope of the provision, for example, whether a hobby activity could fall within the declared class of entities.

#### Recommendation 13

**The IGTO recommends the heading of section 6 of the exposure draft Tax Administration (Tax Debt Information Disclosure) Declaration 2019 be amended to refer to ‘entities registered in the Australian Business Register’.**

## ISSUE 14—PARAGRAPH 6(1)(A) IS UNCLEAR WHETHER REGISTRATION IN THE ABR IS PRIMA FACIE EVIDENCE THAT A TAXPAYER IS ENTITLED TO BE A REGISTERED ENTITY

Paragraph 6(1)(a) of the Exposure Draft Declaration is unclear as to what evidence is needed to meet the requirement of the provision. For example, whether the provision only requires an entity to be registered in the ABR or whether one must have regard to whether an entity is entitled to have an ABN and be registered in the ABR under the ABN Act. We submit that paragraph 6(1)(a) of the Exposure Draft Declaration be amended to provide a bright line test and only require entities to be registered in the ABR.

### Reasons and explanation

The criteria in paragraph 6(1)(a) refers to registration under the ABN Act. Entitlement to an ABN and registration in the ABR requires entities to be ‘carrying on an enterprise’.<sup>25</sup> The concept of ‘enterprise’ for the purposes of the ABN Act refers to the definition articulated in section 9-20 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

The question as to whether a taxpayer is or is not carrying on an enterprise is a hard question of fact and is not a bright line test. Indeed, the ATO’s Miscellaneous Taxation Ruling MT 2006/1 explains that,

*Entitlement to be registered for an ABN is not restricted to entities carrying on a business. Some entities such as Corporations Act companies, superannuation funds and government entities are entitled to an ABN. For other entities the entry threshold chosen for the ABN regime is an enterprise test. This test is defined in the legislation and covers a wide range of activities including leasing, and activities done by charities. Activities done by particular entities are included in the definition of enterprise so that those entities can become registered for ABN and GST purposes and to potentially allow them to obtain input tax credits.*<sup>26</sup>

A clearer approach would be to rely upon the first requirement in paragraph 6(1)(a) – that the entity is registered in the ABR – as it would create a bright line test. Practical issues with the IGTO providing independent community assurance before a notice of intended disclosure is issued by the ATO, including verifying if an entity is registered in the ABR, is considered under Issue 10.

### Recommendation 14

**The IGTO recommends paragraph 6(1)(a) of the exposure draft Tax Administration (Tax Debt Information Disclosure) Declaration 2019 be amended to require the registration of an entity in the Australian Business Register.**

## ISSUE 15—PARAGRAPH 6(1)(B) INTERACTION BETWEEN ‘ONE OR MORE TAX DEBTS TOTALLING \$100,000’ AND ‘DUE AND PAYABLE FOR MORE THAN 90 DAYS’ IS UNCLEAR

Paragraph 6(1)(b) requires there to be ‘one or more tax debts, the total of which is at least \$100,000, that have been due and payable for more than 90 days’. We submit that the wording of paragraph 6(1)(b) be amended to make it clear that only debts that have been outstanding for 90 days will be considered towards the \$100,000 threshold.

### Reasons and explanation

The current wording of paragraph 6(1)(b) is unclear. Where a taxpayer has more than one debt, it is unclear whether only those debts which are more than 90 days outstanding are to be used in calculating the \$100,000 threshold.

For example, say a taxpayer has a \$50,000 debt that has been outstanding for more than 90 days and subsequently lodges their Business Activity Statement which has a new \$50,000 liability that was not paid by the relevant due and payable debt. The question arises, based on the existing wording of paragraph 6(1)(b), whether a taxpayer in this scenario would meet the threshold requirement as only half of the total debt amount of \$100,000 was outstanding for more than 90 days.

Accordingly, the IGTO considers that the wording of paragraph 6(1)(b) be amended to make it clear that only debts that have been outstanding for 90 days will count towards the \$100,000 threshold.

### Recommendation 15

**The IGTO recommends paragraph 6(1)(b) of the exposure draft Tax Administration (Tax Debt Information Disclosure) Declaration 2019 be amended to make it clear that only debts that have been outstanding for 90 days will count towards the \$100,000 threshold.**

## ISSUE 16—PARAGRAPH 6(1)(B) 90-DAY OUTSTANDING DEBT PERIOD POLICY INTENT IS UNCLEAR GIVEN THE PARAGRAPHS 6(2)(B) TO (E) DISPUTED DEBT EXCLUSION CRITERIA

Paragraph 6(1)(b) includes within the declared class of entities those with one or more debts totalling \$100,000 that have been outstanding for more than 90 days. However, the relevant tax debts may be excluded under paragraphs 6(2)(b) to (e) if the taxpayer is formally disputing the debts. The formal dispute process, from an objection lodged with the ATO to external appeal to the Federal Court of Australia (FCA), is unlikely to be resolved within 90 days. We submit that the Exposure Draft Declaration be amended to require debts to be outstanding for more than 90 days and that taxpayers have exhausted their appeal rights.

### Reasons and explanation

Paragraph 6(1)(b) of the Exposure Draft Declaration includes those with one or more tax debts totalling \$100,000 that have been outstanding for more than 90 days in the class of entities who may have their debts disclosed to CRBs. However, as per paragraphs 6(2)(b) to (e), some tax debts that are subject to certain formal disputes by the taxpayer are excluded from the calculation of total debts.



The payment of many tax liabilities is required either 21 or 28 days after an assessment or after the relevant Business Activity Statement reporting period.<sup>27</sup> A taxpayer may, however, dispute the quantum of tax debt.

In many circumstances, a taxpayer has 60 days from the date of assessment to lodge an objection. In some circumstances the timeframe may be up to 4 years. Moreover, the ATO may agree to an extension of time to accept an objection.<sup>28</sup>

The ATO then has 60 days to decide upon the objection, if not, the taxpayer can give the ATO a notice to make a decision. If, after a further 60 days, the Commissioner has still not decided upon the objection, the Commissioner is taken to have disallowed the objection.<sup>29</sup>

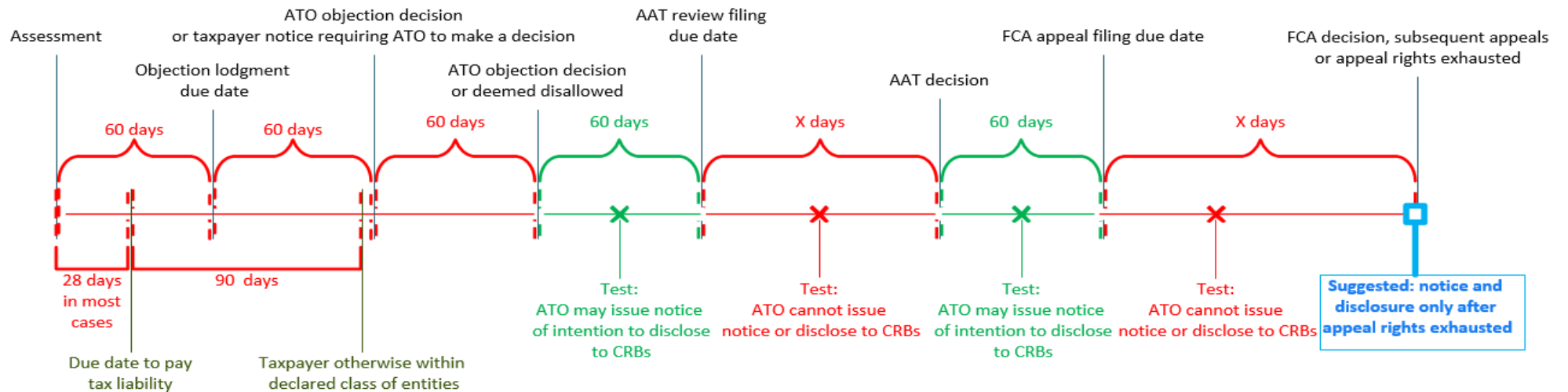
A disallowed objection enables the taxpayer to seek external review of the Commissioner's decision by the Administrative Appeals Tribunal (AAT).<sup>30</sup> Such review must be sought within 60 days of the objection decision.<sup>31</sup> However, it is possible to seek an extension of time from the AAT.<sup>32</sup> The AAT will then take the time it needs to make its review decision.

Following the AAT's review decision, taxpayers may appeal to the FCA if they remain dissatisfied. Such appeal must be lodged within 60 days of AAT's decision.<sup>33</sup> Again, the FCA will take the time it needs to make its appeal decision.

As such, the dispute process, including the intervening timeframes to seek additional review or appeal, may be a lengthy process and not be resolved within 90 days of the debt being outstanding. The Exposure Draft Declaration is also unclear whether a notice of intended disclosure could be issued to taxpayers during any intervening periods before additional review or appeal may be sought. For example, a taxpayer may remain within the declared class of entities and have their information disclosed to CRBs during an intervening period. Accordingly, it is difficult to administer and comply with the tax law as designed – for both the ATO and taxpayers.

A potential dispute process and the relevant ATO debt disclosure periods are shown below for illustration purposes only.

### Example of timeline for a dispute with the ATO



Key:

- ATO cannot issue notice of intention to disclose to CRBs ————
- ATO can issue notice of intention to disclose to CRBs ————

The above example assumes a sequence of events as follows: assessment, objection, ATO decision disallowing the objection, review sought in the AAT and appeal to the FCA.

The timeline illustrates that there will be periods within a ‘normal’ dispute continuum where the ATO could disclose tax debt information to a CRB (the line segment in green) in circumstances when the taxpayer disputes that they have a debt at all or cannot accept the terms of the ATO payment arrangement.

Conversely, where the taxpayer has entered payment arrangement with the ATO, there is no opportunity to notify the CRB even where the debt is more than 90 days old. Where taxpayers are reluctant to enter payment arrangements due to the terms offered by the ATO, the disclosure to the CRB may be unfair. The IGTO can assist taxpayers to secure fair payment arrangements with the ATO in these circumstances. However, the IGTO has no power to negotiate payment arrangements with the ATO or require it to agree to payment arrangement terms. Similar themes are considered under Issue 17.

We submit that entities should be entitled to exhaust their review and appeal rights and the Exposure Draft Declaration be amended to include within the declared class of entities those with tax debts that have been outstanding for more than 90 days and that have exhausted their review and appeal rights in respect of those debts.

### Recommendation 16

**The IGTO recommends paragraph 6(1)(b) of the exposure draft Tax Administration (Tax Debt Information Disclosure) Declaration 2019 be amended to include a requirement that debts be outstanding for more than 90 days and that review or appeal rights have been exhausted.**

## ISSUE 17—SUBSECTION 6(2) DEBT EXCLUSIONS SHOULD BE EXPANDED TO REQUIRE ADDITIONAL EXCLUSIONS

Subsection 6(2) only excludes tax debts from the calculation of total debts if a debt is subject to a payment arrangement, certain formal dispute processes or subject to an active complaint with the IGTO. We submit that the exclusion criteria be expanded to include additional debt management processes, additional formal dispute processes and be extended to include informal dispute processes.

### Reasons and explanation

Subsection 6(2) provides a list of specific situations where tax debts may be excluded from the calculation of total debts. However, there are a range of other situations where taxpayers may consider that they would be effectively engaging with the ATO in relation to their outstanding debt.

First, a taxpayer may seek to engage with the ATO to manage their tax debt other than by way of an agreed payment arrangement. As noted in the IGTO’s previous submission, taxpayers may also effectively engage with the ATO by seeking a payment deferral, provide security or be seeking debt release for serious financial hardship (e.g. a sole trader that is no longer trading).<sup>34</sup> We submit that the additional debt management option be included in the exclusion criteria.

Secondly, taxpayers may be involved in additional types of formal dispute with the ATO, such as by appeal to the Full FCA or High Court of Australia. Taxpayers may also be involved in separate but related formal disputes with the ATO about the tax debt. For example, the ATO may take legal action in the state Supreme Courts to commence insolvency proceedings against a taxpayer. We submit that the exclusion criteria include the latter type of formal disputes.

Lastly, taxpayers may effectively engage with the ATO by availing themselves of the ATO's structured informal dispute mechanisms, such as in-house facilitation, internal independent review or through a complaint lodged with the ATO. Moreover, taxpayers may also be in the process of negotiating a payment arrangement or other debt management process with the ATO. Such negotiation may be frustrated where the ATO takes collateral debt collection action, such as extracting funds from bank accounts by way of a garnishee notice or limiting access to the funds by seeking a freezing order from the court. Indeed, as noted in the IGTO's previous submission, the IGTO receives complaints concerning taxpayer difficulty in negotiating a suitable payment arrangement.<sup>35</sup> Accordingly, informal methods of dispute resolution should provide a basis for the debt to be excluded from the calculation of total debts in estimating the \$100,000 threshold.

Without the expanded range of exclusions noted above, taxpayers may inadvertently and unnecessarily remain in the declared class of entities and have their information disclosed to CRBs.

### Recommendation 17

**The IGTO recommends that subsection 6(2) of the exposure draft Tax Administration (Tax Debt Information Disclosure) Declaration 2019 be amended to include additional debt management processes, additional formal dispute processes and be extended to include informal dispute processes.**

# GLOSSARY

| Abbreviation               | In Full   |
|----------------------------|---|
| AAT                        | Administrative Appeals Tribunal   |
| ABN                        | Australian Business Number  |
| ABN Act                    | <i>A New Tax System (Australian Business Number) Act 1999</i>   |
| ABR                        | Australian Business Register  |
| ATO                        | Australian Taxation Office  |
| Bill No. 1                 | Treasury Laws Amendment (2019 Tax Integrity And Other Measures No. 1) Bill 2019   |
| CDDA Scheme                | Scheme for Compensation for Detriment Caused by Defective Administration  |
| Commissioner               | Commissioner of Taxation  |
| Committee                  | Senate Economics Legislation Committee  |
| Committee Inquiry          | Senate Economics Legislation Committee's inquiry into the provisions of the Treasury Laws Amendment (2019 Tax Integrity And Other Measures No. 1) Bill 2019 |
| CRB                        | Credit Reporting Bureau   |
| Explanatory Memorandum     | Explanatory Memorandum to the Treasury Laws Amendment (2019 Tax Integrity And Other Measures No. 1) Bill 2019   |
| Explanatory Statement      | Explanatory Statement to the Taxation Administration (Tax Debt Information Disclosure) Declaration 2019   |
| Exposure Draft Declaration | Exposure Draft Taxation Administration (Tax Debt Information Disclosure) Declaration 2019   |
| FCA                        | Federal Court of Australia  |
| GST Act                    | <i>A New Tax System (Goods and Services Tax) Act 1999</i>   |
| IGT Act                    | <i>Inspector-General of Taxation Act 2003</i>   |
| IGTO                       | Inspector-General of Taxation and Taxation Ombudsman  |
| Treasury Consultation      | Treasury's consultation on the exposure draft Taxation Administration (Tax Debt Information Disclosure) Declaration 2019                                    |

## END NOTES

---

<sup>1</sup> Senate Economics Legislation Committee, Parliament of Australia, *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 [Provisions]* (2019) <<https://www.aph.gov.au>>.

<sup>2</sup> The Treasury, *Disclosure of Business Tax Debts* (2019) <<https://treasury.gov.au/>>.

<sup>3</sup> Explanatory Memorandum, House of Representatives, Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019, p 49.

<sup>4</sup> Inspector-General of Taxation and Taxation Ombudsman (IGTO), *Submission on Transparency of Business Tax Debts Measures* (2018) paras [1.6] to [1.18].

<sup>5</sup> Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 s 355-72(1)(c).

<sup>6</sup> The ATO may recover general interest charges, shortfall interest charges and penalties as a debt due to the Commonwealth and payable to the Commissioner: see ss 250-10 and 255-5 of sch 1 to the *Taxation Administration Act 1953*.

<sup>7</sup> IGTO, above n 4, paras [1.19] to [1.22].

<sup>8</sup> Explanatory Memorandum, House of Representatives, Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019, p 60.

<sup>9</sup> IGTO, above n 4, paras [1.23] to [1.26].

<sup>10</sup> Explanatory Memorandum, House of Representatives, Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019, p 60.

<sup>11</sup> *Acts Interpretation Act 1901* s 29.

<sup>12</sup> IGTO, above n 4, paras [1.23] to [1.26].

<sup>13</sup> Australia Post, *Calculate postage and delivery times* <[www.auspost.com.au](http://www.auspost.com.au)>.

<sup>14</sup> Explanatory Memorandum, House of Representatives, Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019, p 62.

<sup>15</sup> ATO, *Current year commitments to service* (2019) <<https://www.ato.gov.au>>.

<sup>16</sup> IGTO, above n 4, paras [1.10] to [1.13].

<sup>17</sup> Explanatory Memorandum, House of Representatives, Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019, p 62.

<sup>18</sup> *Ibid*, pp 61-62.

<sup>19</sup> *Inspector-General of Taxation Act 2003* s 15; *Ombudsman Act 1976* s 9.

<sup>20</sup> IGTO, *Review into the Australian Taxation Office's use of Garnishee Notices* (2019) pp 38, 123.

<sup>21</sup> IGTO, *Review into the Australian Taxation Office's Change Program* (2011) pp 107-109.

<sup>22</sup> IGTO, *Review into the Taxpayers' Charter and Taxpayer Protections* (2016) p 81.

<sup>23</sup> *Acts Interpretation Act 1901*, ss 13(1) and (2).

<sup>24</sup> Australian Taxation Office (ATO), *Income tax: when does a company carry on a business?*, PS LA 2019/1, 5 April 2019, paras [5], [7].

<sup>25</sup> *A New Tax System (Australian Business Number) Act 1999* ss 8 to 9.

<sup>26</sup> ATO, *The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number*, MT 2006/1, 19 April 2017.

<sup>27</sup> ATO, *Individuals and trusts* (2019) <<https://www.ato.gov.au>> ; ATO, *Due dates* (2019) <<https://www.ato.gov.au>>.

<sup>28</sup> *Taxation Administration Act 1953* ss 14ZW and 14ZX; ATO, *Decisions you can object to and time limits* (2019) <<https://www.ato.gov.au>>.

<sup>29</sup> *Taxation Administration Act 1953* s 14ZYA.

<sup>30</sup> *Taxation Administration Act 1953* s 14ZZ.

<sup>31</sup> *Taxation Administration Act 1953* s 14ZZC.

<sup>32</sup> Administrative Appeals Tribunal, *Time limits* (2019) <<https://www.aat.gov.au>>.

<sup>33</sup> *Taxation Administration Act 1953* s 14ZZN.

<sup>34</sup> IGTO, above n 4, para [1.28].

<sup>35</sup> *Ibid* paras [1.29]-[1.30].