CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

14 August 2015

Mr Russell Campbell
General Manager, Small Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: taxlawdesign@treasury.gov.au

Dear Mr Campbell,

Improving tax compliance: enhanced third party reporting, pre-filling and data matching – Exposure draft

Chartered Accountants Australia and New Zealand welcomes the opportunity to comment on the exposure draft *Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015: Third party reporting* **(ED)** and the accompanying explanatory material **(EM)**.

Chartered Accountants Australia and New Zealand is made up of over 100,000 diverse, talented and financially astute professionals who utilise their skills every day to make a difference for businesses the world over. Our members are known for professional integrity, principled judgment and financial discipline, and a forward-looking approach to business. We focus on the education and lifelong learning of members, and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

Set out below are comments of a general nature about the collection and use of data.

For detailed comments on the ED and EM, see Attachment A.

The need for an e-government policy context, with Ministerial ownership and a community education campaign

We fully agree with the statement in paragraph 1.9 of the EM that:

> Developing a comprehensive and robust third party reporting regime has the potential, over time, to challenge many of the assumptions underpinning Australia's self-assessment system. As such, the introduction of these regimes may provide opportunities to change how individuals and other self-assessment taxpayers interact with the tax system in the future.

As we noted in our 11 March 2014 submission to Treasury when the enhanced data reporting proposal was first raised, our organisation supports ATO plans to 're-invent' tax processes by:

- Maintaining and improving already high levels of community tax compliance by capturing data in a format that enables data analysis of taxpayer affairs (and transfer payment entitlements) without the need for direct contact and substantiation.
- Using such data to pre-fill tax return labels, with the relevant tax returns accessible online by taxpayers and\or their appointed tax agents.

We see initiatives such as this as part of a broader plan to implement the Henry Report recommendations concerning the provision of a seamless government portal for tax and transfer payment participants[1]. The potential for red tape reduction is enormous although the size of the prize will depend on whether accompanying legislative changes can be achieved through the tax reform process to make the tax law simpler.

We regard the schedule approach to reportable transactions in the ED as clearly expandable (e.g. to "corporate events" impacting private companies) at a future date.

Indeed, the enhanced data reporting proposals are an extension of what Chartered Accountants are already witnessing now:

- Basic pre-filling of tax return data (e.g. salary, interest, dividends, tax credits etc).
- The myGov.au central portal for dealing with government, linked to agency sites such as myTax.
- Standard Business Reporting (SBR) enabled tax and business software.
- The development of a Single Touch Payroll reporting framework.

The 'products' listed above are themselves part of a growing range of products being planned and developed within the ATO. In recent discussions with ATO officials, new on-line products such as myBAS and myRuling have been mentioned.

In an international tax context, we have also seen the introduction of electronic reporting changes designed to deter those minded to evade tax:

- Tax compliance reporting through the Foreign Account Tax Compliance Act (FATCA), introduced in the USA in 2010 and agreed to by Australia on 28 April 2014[2], and
- The OECD Common Reporting Standard (CRS) for the automatic exchange of financial account information from 1 January 2017, with the first exchange of information in 2018[3].

Both regimes have imposed substantial data collection costs on affected financial institutions.

But despite what is clearly a substantial 'ramping-up' of a whole of government data collection strategy driven largely by tax considerations, we remain disappointed that this strategy lacks the support of a sponsoring government Minister willing to articulate for Australian citizens and our

[1] Henry Tax Review, Recommendations 122 to 131. Refer: http://taxreview.treasury.gov.au/content/finalreport.aspx?doc=html/publications/papers/final_report_part_1/chapter_12.htm

[2] For general information on FATCA, refer Internal Revenue Service (IRS) website: http://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-(FATCA). The Australian Government's agreement with the United States of America meant that, from 1 July 2014, Australian financial institutions have been obliged to collect information about their customers who are likely to be US taxpayers and to provide that information to the ATO which in turn provides that information to the IRS.

[3] The CRS requires banks and other financial institutions to collect and report to the ATO financial account information on non-residents. The ATO will then exchange this information with the foreign tax authorities of the non-residents. Likewise, the ATO will receive financial account information on Australian residents from other countries' tax authorities.

business community how big data collection and analysis will revolutionise the way they interact with government and various statutory agencies[4].

It could be that this task falls to the newly appointed head of the Digital Transformation Office, Paul Shetler. Although Mr Shetler will no doubt play a leading role, a government Minister should own and sponsor the policy direction.

We understand the wariness around privacy, red tape for data collectors, implementation risk and the compliance cost issues associated with the overall strategy.

E-government also raises legitimate and sensitive concerns about further cuts to the number of public sector employees who would otherwise handle or analyze non-electronic processes. Within the accounting profession too, there are some who worry about the impact such changes will have on the role of intermediaries (such as tax agents) and client relationships.

But these types of concerns should not be used as an excuse for avoiding a now well overdue public communication and education exercise.

Where is the whole of government plan for how Australians will interact with Government by, say 2020?

And who in Government is responsible for this strategy?

myTax = myData: the ATO's role in communicating to the community its tax data collection practices and the use it makes of data

Individual government agencies – particularly the ATO – also have a key role to play in communicating the tax aspects of the overall data strategy and the broader community benefits expected from that strategy.

CA ANZ has already raised with the ATO the need to change long-held community perceptions that tax-related data is a secretive tool used to 'catch-out' taxpayers. It is pleasing to see attitudes clearly changing within the ATO in this regard, with ATO officers more likely nowadays to reveal 'up-front' to taxpayers the information which has prompted taxpayer contact and risk reviews (except in cases of suspected fraud or evasion).

As part of the 'public-facing' aspect of the ATO Reinvention process therefore, we need as a community to foster an environment in which:

- There is a better, more detailed understanding of the various sources and types of tax-related data obtained about taxpayers.
- Taxpayers have easier access to all the tax data collected about them without having to navigate Freedom of Information or other channels[5].

[4] This is surprising, given the Coalition's Policy for E-Government and the Digital Economy, September 2013. See also Recommendation 131 of the Henry Tax Review.

[5] The current guidance on the ATO website clearly states that the ATO obtains a large amount of data about taxpayers but, under the heading "How you can access or correct personal information held about you", indicates that taxpayers can only easily acquire limited categories of information: "If you want to access or amend your own personal information, you should contact us first. You can get copies of many documents without the need to make a formal request for them under the *Freedom of Information Act 1982*…For example, you can get a copy of any of your recent income tax returns, payment summaries or notices of assessment without making a freedom of information request." Refer: https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Privacy-notices/Privacy-policy/ (Accessed 22 July 2015).

- Information is also conveyed about how such data is being:
  - interpreted and applied by the ATO to a taxpayer's circumstances[6], and
  - shared by the ATO ("on-disclosure") with other organisations[7].

We believe that, by being open about big data and e-government, agencies such as the ATO can do much to engender community confidence that tax, transfer payment entitlements and other government-related matters are being managed on a sound basis for the overall benefit of the community.

For taxpayers, such openness also:

- Promotes confidence in pre-filled data, and
- Sends a strong signal that helps deter non-disclosure of tax-related information.

We believe that the ATO should:

1. As an early goal, update its public website to provide a comprehensive, plain English summary of the information that it collects about Australians using its authorized data-gathering powers, and the use to which such data is put (including the agencies with whom such data is shared), and
2. As a medium term goal, and as part of a whole of government project, participate in a 'myData' project which enables Australians to see in summary form the data which is collected about them.

myTax = myData: privacy and other safeguards

The proposals reflected in the draft legislation may raise concerns in some quarters about privacy and data security arrangements, particularly at a time when public and private sector systems here and abroad have occasionally proved themselves susceptible to hackers and fraud.

We fully acknowledge that the draft legislation does not, of itself, massively increase the data the ATO already has. Rather, it enables information to be collected in a manner and format compatible to ATO systems.

We therefore suggest that the EM include a summary of the privacy safeguards relating to data collected by the ATO (and indeed other government agencies) and the role played by organisations such as the independent Office of the Australian Information Commissioner (OAIC) where there are concerns about the collection and use of such data.

We note however that the OAIC is currently ear-marked for restructuring and, as a result of delays in passing the necessary legislation and decisions taken in the 2015-16 Federal Budget, is now operating with 12 months of transitional funding[8].

Different OAIC functions – which are (broadly) privacy functions conferred by the *Privacy Act 1988*, oversight of the operation of the *Freedom of Information Act 1982* and review of decisions made under that Act, and government information policy functions – are to be merged into the Australian Human Rights Commission, the Administrative Appeals Tribunal, the Commonwealth Ombudsman

[6] At the moment, the ATO is sending "OK letters" to some taxpayers with straightforward tax affairs without going into any detail about how data collection and analysis

[7] Currently, the ATO website expresses this in only general terms. Refer: https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Privacy-notices/Privacy-policy/

[8] *OAIC functions - operational update*. Source: http://www.oaic.gov.au/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic/oaic-functions-operational-update

and the Attorney-General's Department[9]. The privacy function for example is to be undertaken by a Privacy Commissioner to be established as an independent statutory position within the Australian Human Rights Commission[10].

At the time of writing, the Bill to give effect to these changes was languishing before the Senate, having first been introduced into Parliament on 2 October 2014[11].

It seems to us that there is currently a disconnect between the pace of development in areas such as data collection and online services within government circles and the status of organisations responsible for oversight and safeguards.

This issue should be addressed as a priority so that these various functions of government can co-develop policy and implementation plans and, once new systems are up and running, work appropriately together.

Tax data and the future relationship between taxpayers, the ATO and tax intermediaries (tax or BAS agents)

The information that the ED requires third parties to disclose can largely be described in tax parlance as 'gross revenue' or 'capital proceeds'. The ATO will not be able to calculate taxable income (broadly, assessable income less deductions, less losses and tax offsets) from this information. Rather, and amongst other uses the ATO will make of the information, the ATO will be expanding the pre-filling services it currently provides.

In relation to publicly listed shares for example, this would presumably involve pre-filling the gross proceeds of each share sale transaction on a capital gains tax schedule[12] and leaving the rest of the schedule blank for the taxpayer or their tax agent to complete in relation to possible CGT exemptions, cost base calculations, and the application of tax losses. Whilst a taxpayer would normally be required to undertake these calculations to complete an income tax return form, a taxpayer is not currently required to provide that level of detail to the ATO[13]. As a consequence, not all the information that the ATO requires to completely understand each transaction will be electronically collected[14].

For example, in relation to listed shares, the ATO will not have access to:

- Historical information as to the which particular shares/units in a bundle were sold, or
- Cost base reductions due to tax-free distributions, or cost base changes due to restructures.

This raises an interesting question as to why the digital transformation plans reflected in the ED do not consider the role that intermediaries can play in (for example):

- "Reverse" pre-filling: that is, whether registered tax agents themselves could become a trusted source of pre-filled data to the ATO where complex calculations are required.

---

[9] *Smaller and More Rational Government 2014-15*, Ministerial Paper by Senator Mathias Cormann, Minister for Finance, May 2014. Source: http://www.financeminister.gov.au/publications/docs/smaller-and-more-rational-government.pdf

[10] *Smaller Government — Privacy and Freedom of Information functions - new arrangements*. 2014-15 Federal Budget Paper No 2, Part 2 Expense Measures (Attorney-General's), Source: http://budget.gov.au/2014-15/content/bp2/html/bp2_expense-05.htm

[11] Freedom of Information Amendment (New Arrangements) Bill 2014.

[12] Note however that data does not of itself explain whether a CGT asset is held on capital or revenue account, or as trading stock.

[13] What the taxpayer currently provides is the total current year capital gain, net capital losses carried forward and the net capital gain for all capital transactions. Work papers typically prepared by a tax agent provide the detail.

[14] Longer term however, it would not surprise if new electronic tools are developed for cost base records, and new service offerings from stockbrokers etc may emerge to provide tax-related services for CGT calculations.

- Correcting pre-fill data supplied by the ATO (for example, where the proceeds from the sale of shares are actually ordinary income, rather than as pre-filled capital proceeds for CGT purposes).

Perhaps this is because the ATO, being cognizant of the fact that the listed shares have been sold, will 'push' relevant cost base information to the taxpayer with the expectation that the taxpayer will undertake the tax calculation.

This leads to a broader question about the role of intermediaries in a modern, technology-based tax system. Although there have been some discussions around this in ATO – practitioner consultation forums[15], we see this as an important issue which should be addressed as part of the e-government strategy referred to earlier. No one knows what the future will look like, but we do know that there are many talented men and women in the accounting profession whose knowledge and value to a properly functioning tax system should not be overlooked by policy makers.

One idea that we are interested in exploring is whether the concept of a tax agent will eventually become outmoded, and replaced by a broader "business broker" regulatory framework where accountants could provide a broader range of assurance services on tax and other matters.

Compliance costs for data collectors and implementation issues

The EM is silent on the work we assume has been undertaken in quantifying the compliance costs for those required to provide the data to the ATO.

We note that such costs will be borne by entities found in both the private and public sector.

Where State and Territory governments bear the costs (i.e. for enhanced real estate data collection) it is unclear whether the Commonwealth will contribute to those costs.

There is certainly no indication of funding to meet the private sector's costs of complying with enhanced data collection, nor the likely impact of the passing-on of such costs.

Our understanding is that the costs which will be imposed by the ED on fund managers and stockbrokers in modifying existing systems to collect data is a concern.

Given the behind the scenes work already done by the ATO and some stakeholders in the software industry, it would be strange indeed if the ATO has not yet developed a sense of the compliance costs involved and the feasibility of a 1 July 2016 start date. Agencies such as the Office of Best Practice Regulation would presumably have been called upon to assist in this regard.

It would also surprise us if, at an agency level, the ATO has not yet attempted to quantify the cost of net collection benefits which the ED will eventually help it achieve. These benefits to the regulator are not mentioned in the EM.

We submit therefore that this particular legislation should be introduced with a *highly detailed* regulatory impact statement, cost-benefit analysis and implementation project plan.

[15] The Future of the Tax Profession Working Group, with one sub-group focusing on short-term issues (particularly the transition from the electronic lodgment service to standard business reporting on 1 July 2016), and the other looking at longer term (2020 and beyond) issues.

Tax treatment of costs incurred by private sector data collectors

Some data collectors required to provide the data detailed in the draft legislation will incur implementation costs (e.g. on new computer hardware, in-house software development, IT skills) and on-going costs which they would not otherwise incur.

We are unaware of any plans to acknowledge the costs borne by private sector data collectors indirectly through the tax system by way of deductions for costs that might otherwise need to be amortised.

The compliance cost analysis suggested above should drive some policy consideration of whether support should be provided to data collectors.

Enhanced data collection arrangements for payment systems and the illegal cash economy

As the Commissioner of Taxation constantly (and rightly) reminds us, the vast majority of taxpayers "do the right thing".

The enhanced merchant data which the ATO will receive if the ED is enacted is therefore likely to further confirm that the majority of business taxpayers are indeed compliant.

And to state the obvious, the ED relating to payment systems only targets those transactions which already produce an electronic data trail.

So it would be useful to understand how the payment system data will be used by the ATO to target *dishonest* businesses operating in the illegal cash economy and provide a more level playing field for honest, tax compliant businesses. Some explanation in the EM and on the ATO website of the use of data for ATO benchmarking purposes (for example) would be helpful.

Again, this is an opportunity to show how the enhanced data collection and analysis can go beyond pre-filling and ATO monitoring of "known" taxpayers and actually build confidence in the tax system.

Detailed comments on the draft legislation and accompanying ATO draft guidance are contained in attachment A.

If you would like to discuss any aspect of this submission further, please do not hesitate to contact me on (02) 9290 5609 or michael.croker@charteredaccountantsanz.com.

Yours faithfully,

Michael Croker
Australian Tax Leader
Chartered Accountants Australia and New Zealand

Attachment A

(Unless otherwise stated, all section references are to those proposed to be inserted into the Taxation Administration Act 1953 by amendments contained in the ED)

Legislation should empower Commissioner to advise by legislative instrument of transactions to be reported, not exempted

In our view, the provisions in proposed new Subdivision 396-B, in particular items 5, 6, 7 and 8 of the table in proposed section 396-55(1), are too broadly drafted and effectively rely on the Commissioner to determine their scope by granting reporting exemptions.

The provisions reflect a 'drag net' style of drafting – everything is 'in' the net unless the Commissioner provides an exemption.

In order for the Commissioner to decide whether or not to provide an exemption from the new reporting requirements to a particular entity, class of entities and/or transactions, the Commissioner must be aware of the type of entities and the specific transactions which are of interest for post lodgment compliance activities and the type of data which can be accurately obtained and adapted to pre-fill taxpayer's returns. Using shares as an example, the ATO appears to have already turned its mind to this by preparing the draft *Discussion Guide: Third Party Reporting for Sales of Shares and Units*.

It is submitted that a more appropriate and workable approach would be for the ED to provide a general power to the Commissioner to require, by legislative instrument, information reporting on specific types of transactions that are required to be reported (having regard to the description of the transactions in the table in proposed section 396-55 and the nature of the information required to be reported in proposed section 396-60) rather than, as currently drafted, imposing on entities a prima facie obligation which requires reporting on any number and type of transactions falling within the relevant item in the table in section 396-55(1) unless the Commissioner has provided an exemption.

Whether or not a legislative instrument is used to identify the transactions to be reported or, as currently drafted, to identify the transactions and entities which are exempted from the third party reporting regime, the relevant legislative instruments should be released for consultation and comment to ensure that the wording of the legislative instrument is clear and precise.

We note that draft legislative instruments required for the implementation of the regime have not been released for comment.

Given the amount of behind the scenes work already done on this project in preparing the Discussion Guides, such drafts should be easy to develop[16].

Transactions within items 6, 7 and 8 of the table in section 396-55

Proposed new Subdivision 396-B relies on reporting of 'transactions' described in the table in proposed section 396-55.

That description first requires that there be a 'transaction' which then has specific consequences. The word 'transaction' is not defined and so would presumably take an ordinary meaning and not include, for example, acts or events.

[16] With only limited comments provided in the EM, the Discussion Guides released by the ATO have effectively been the primary means by which to identify the potential scope of the third party reporting regime proposed by the ED.

(a) 'A transaction that results…'

In item 6 in proposed section 396-55(1), the transaction on which a listed company must report is:

> "a transaction that:
> (a) results in a change to the type, name, number or value of *reportable securities relating to the company that are held by an entity; and
> (b) is made otherwise in the ordinary course of trading on an Australian financial market."

A similar description applies to reportable transactions in item 7 for trustees of unit trusts (including it would seem, as currently drafted, both listed and unlisted unit trusts).

A listed entity should be able to identify an off-market transaction that results in a change to the type, name and number of reportable securities relating to the company that are held by another entity.

However, what may be more problematic for the listed entity will be determining whether a particular transaction "results in a change to the ... value of reportable securities relating to the company that are held by an entity". To illustrate the broad and uncertain application of item 6 (and items 7 and 8) in this regard, we note the following:

- The legislation refers to a change in the *value* of the reportable securities relating to the company (or units in the unit trust).
- It may be difficult for a listed entity to determine whether a particular transaction *results* in a "change to the ... value" of the reportable securities relating to that entity. That is, a burden is placed on the reporting entity to test whether the transaction "results in a change to the ... value of reportable securities" but the legislation does not specify *how* and *when* to determine that change in value (e.g. is the value to be tested immediately before and immediately after the transaction is completed?).

(b) Corporate events

The EM (paragraph 1.44) states that information on types of transactions which are "corporate events" are also required to be reported to the Commissioner under item 6.

There is no definition, or reference in the legislation to, a "corporate event".

Paragraph 1.45 of the EM then goes on to say that paragraph (a) of item 6 is "intended to encompass a broad range of transactions that may either give rise to a tax-related liability or allow the Commissioner to trace the ownership of reportable securities or units in a unit trust until such time as a tax related liability may arise".

The *Discussion Guide: Third Party Reporting for Sales of Shares and Units* acknowledges that "corporate events" is not a legally defined term and impliedly accepts that it could include a varied type and number of activities which would need to be reported.

Because of the possible vast array of 'corporate events', the Discussion Guide therefore seeks to categorise key transactions which could occur according to existing CHESS reason codes and seeks consultation on what might be a "standardised list of corporate events"[17]. The ATO indicates that this list may also be relevant as a "list of possible transactions" in the case of managed funds. This appears to confirm that even though the legislation would require reporting of all transactions which come within the description in item 6 (and item 7), the ATO accepts that out of that vast array there will be some key transactions which are easily identifiable and reportable.

[17] The CHESS codes used in the Discussion Guide should be made clearer, rather than just providing acronyms. Members have asked us to clarify how an allotment of shares pursuant to an employee share scheme is treated.

A precedent for identifying key corporate events is contained in the company loss provisions which require reference in certain circumstances to periods in which there has been a "corporate change", as defined in section 166-175 of the *Income Tax Assessment Act 1997* (ITAA 1997). Such a definition indicates that it is possible to identify and describe the specific types of transactions to which the reporting requirement would apply.

As suggested above, with such a broad range of transactions potentially falling within the provisions as currently drafted, a more certain and workable approach would be for the legislation to describe the type of transactions which may be specified in a legislative instrument by the Commissioner as reportable transactions. The Commissioner would determine, having regard to the description of the transactions in the legislation, the exact transactions required to be reported and specify those transactions in a legislative instrument (released in draft form for consultation and comment).

Proposed section 396-55(1) - timing of provision of a report to the Commissioner

Proposed section 396-55(1)(b) provides that the reporting entity must provide the report to the Commissioner before the 31st day after the end of the financial year or such other time specified by the Commissioner in a legislative instrument for the relevant item.

The EM states that if the Commissioner does not modify the reporting dates, each entity will be required to report by 31 July each year on transactions that happened during the previous financial year (paragraph 1.24).

To make it clear that the last day on which the report can be provided includes the 31st day after the end of the period, it is suggested that proposed section 396-55(1)(b) be amended to provide: "... give the report to the Commissioner *on or* before: (i) the 31st day after the end of that period ...".

Drafts of legislative instruments should be released

Set out below are matters referred to in the ATO Discussion Guides that would need to be specified by the Commissioner by way of a legislative instrument.

As previously mentioned, it is submitted that draft legislative instruments which support the implementation of the measure, and in particular the following matters referred to in the ATO Discussion Guides, should be released for public comment to ensure that the wording of the legislative instrument is clear, precise and effective.

- The *Discussion Guide: Government grants and payments* sets out the classes of entities that the ATO proposes will not be required to report under item 2 of the table in proposed section 396-65. The Discussion Guide also states that the report for a financial year will be due on 28 August and states that the ATO will not require government entities to report grants or payments where it is known that the grant is tax exempt, either through legislation or having sought ATO advice. The classes of entities granted an exemption and the specific exemption for payments that are tax exempt are required to be set out by the Commissioner in a legislative instrument under proposed section 396-65(4) and the amended due date specified in a legislative instrument under proposed section 396-55(1)(b)(ii).

- The *Discussion Guide: Third party report of property transfer data* indicates that the ATO anticipates requiring States and Territories to report on the transfer of real property on a quarterly basis. Proposed section 396-55(1)(a) allows the Commissioner by legislative instrument to specify a period "for that item" in which the entity is mentioned in the table in proposed section 396-55(2). The Commissioner is permitted to change the reporting period from the financial year but this can only be done, according to proposed section 396-55(1)(a)(ii), if the Commissioner specifies the period by legislative instrument for the

particular item. We note that there is no reference to changes in the "standard" reporting period or due date in the EM regarding real property transfers, other than a reference in Example 1.3 that the relevant State etc would be required to report on the sale "after the end of the quarter" in which the sale occurred and within the reporting period specified by the Commissioner.

- The *Discussion Guide: Third party reporting for sales of shares and units* sets out on the first page those entities who will not need to report for transactions falling within items 6, 7 and 8, including special conditions applicable to the exemption for the trustees of trusts. The Commissioner is given the power under proposed section 396-65 to exempt a specified class of entities from the reporting requirements or to exempt them for specified transactions, but in that case, the Commissioner must do so by legislative instrument. It is currently unclear (for example) whether private unit trusts are intended to be exempted.

Exemption and objection process

Proposed section 396-65 provides that the Commissioner may notify a particular entity that it is not required to prepare and provide reports under proposed section 396-55, or is not required to do so for specific transactions. The Commissioner is also given the power under section 396-65 to exempt a specified class of entities from the reporting requirements or to exempt them for specified transactions.

(a) Guidelines for Commissioner's decision to exempt

In the case where a particular entity is notified that it is not required to report or not required to do so for specified transactions, or notified that it will not be given a notice that they are not required to report, the entity may object against the decision under Part IVC of the *Taxation Administration Act 1953* (TAA 1953) (proposed section 396-65(2)).

It is submitted that there should be guidelines in the legislation to inform the Commissioner of the basis upon which his decision to exempt or not exempt an entity from the reporting obligations must be made.

Since the reporting entity must state fully and in detail the grounds on which it relies to object against the decision (section 14ZU of the TAA 1953), and on any appeal of the objection decision, the appellant would be required to prove that the taxation decision should not have been made or should have been made differently (section 14ZZO of the TAA 1953), we consider there should be a legislative indication of the basis upon which the Commissioner is required to make the decision to exempt a particular entity or particular transaction.

Through the release of the ATO Discussion Guides, the ATO has already decided on at least some of the criteria and conditions for those entities not required to report. However, the basis for these decisions is unclear.

In addition, we note that the EM indicates that the introduction of formal third party reporting regimes involves a policy trade-off between the compliance benefits to taxpayers and the compliance costs imposed on third party reporters. It is submitted that the broad basis on which the Commissioner should make the assessment of entities potentially liable for reporting and the conditions for the exemption should be reflected in the legislation in order to ensure that the decisions made by the Commissioner does, and can be seen to, implement that policy trade-off.

(b) Application for exemption

As currently drafted, the ED does not allow for an entity to apply for an exemption for itself, for the class of entities to which it belongs or for specific transactions.

It is submitted that since the legislation is so broadly drafted, the legislation should provide a basis on which an entity can apply for an exemption (either for the entity, class of entities or for specified transactions).

The legislation should also specify the timeframe in which the Commissioner would be required to give a notice of his decision.

(c) Withdrawal of exemption

It is submitted that the legislation should specify:

- The period for which the Commissioner can provide the exemption for a class of entities or a specific entity or specific transactions.
- Whether and, if so, how the Commissioner may withdraw a notice of exemption and for what period (presumably prospective).
- Whether a decision to withdraw a notice of exemption for a specific entity or specific transactions will constitute a decision by the Commissioner under proposed section 396-65(2)(b) not to give an exemption notice under proposed section 396-65 and so a decision against which an entity may object.

Proposed Section 396-55(1), item 2

Reporting is required by government related entities for the provision of financial benefits by the government entity to another entity where it is wholly or partly for a supply of services but not where “the supply of services is merely incidental to the provision of goods”.

Example 1.1 in the EM provides an example where the payment is for both the supply of goods (replacement lights) and the services provided in removing faulty lights and installing new ones. It is concluded in the Example that, “The supply of services is incidental to the supply of the goods. The Department should report the entire $1000 to the Commissioner.”

Assuming Example 1.1 correctly reflects the desired policy outcome, the conclusion in the example that the Department must report the entire payment must be on the basis that the payment is *partly* for the supply of services and that the supply of the services is not *merely* incidental to the supply of goods. It is submitted that the EM should be amended to make clear the basis upon which it is concluded that the payment is reportable.

Typographical and other errors identified in the EM

- Paragraph 1.25, insert “the” before “31st day”, so the sentence reads, “... applies to a failure to give the report by *the* 31st day after the end of the reporting period ...”.
- Example 1.6, second paragraph, delete “Pty” after “Burl Design”. As currently drafted, and as indicated earlier in the Example, item 6 only applies to companies whose shares are listed for quotation in the official list of an Australian financial market.