

Tom Reid  
Law Design Practice  
The Treasury  
Langton Crescent  
PARKES ACT 2600

7 January 2016

By Email [taxlawdesign@treasury.gov.au](mailto:taxlawdesign@treasury.gov.au)

Dear Mr Reid

***Exposure Draft – Tax Laws Amendment (2016 Measures No. 1) Bill 2016:  
Commissioner’s remedial power***

Thank you for the opportunity to comment on the proposals set out in the Exposure Draft *Tax Laws Amendment (2016 Measures No. 1) Bill 2016* (**‘the ED’**). We consider the Bill strikes a good balance between adding a useful degree of flexibility to tax administration and providing appropriate safeguards for taxpayers against administrative over-reach.

The measure in the Bill represents an important departure from our strict adherence to the traditional division of functions between the legislature and the administration in the Westminster system. Conferring on the administration an explicit power to ‘remedy’ defects in legislation should require a compelling justification and be surrounded by strict and precise safeguards to protect taxpayers against administrative capriciousness or unwarranted activism.

We agree that there is a case for such a measure. We have seen too many instances where it is accepted that the text of the income tax legislation has miscarried, but the ATO regards itself as unable to interpret and administer the provision in a way that produces an outcome it acknowledges would be sensible.

Ideally, correcting tax legislation would occur through the proper legislative processes. In the past, correcting tax legislation was apparently a low priority for Treasury and the Parliament although those days appear to have changed as one or more Bills each year will now contain a Schedule dedicated to making ‘miscellaneous amendments.’ But it will be an unfortunate outcome of this process if even this limited legislative attention given to correcting substantive problems is curtailed further by the argument that the Commissioner now has a remedial power and can remedy matters himself. This measure is a second-best solution and, although it is worthwhile, we should still aspire to first best.

The safeguards contained in the Bill are very important for taxpayers and we think the taxpayer safeguards have been set at a sensible point:

- the Commissioner must act through a legislative instrument, attracting the provisions of the *Legislative Instruments Act 2003* – s. 370-5(1);
- the proposed change must be consistent with the ‘purpose or object of the provision’ – s. 370-5(1)(a);
- the modification must work to the advantage of taxpayers – s. 370-5(4); and

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- the life-expectancy of a determination is limited to 5 years – s. 370-15(2).

With regard to the 5-year life expectancy, we acknowledge that there is usually a degree of arbitrariness in any sunset clause, but there must be some doubt whether this is sufficient time. On the one hand, 5 years may prove too short and the ATO will find itself constantly having to review and re-issue determinations because Parliament has still failed to act. On the other hand, perhaps a short life expectancy will encourage the ATO to join with taxpayers and increase the pressure on Parliament for a proper remedy. It will be important to monitor experience with this regime to see if the 5 year horizon turns out to be appropriate in practice, or proves too short.

This set of controls should be sufficient to protect against one aspect that does cause us concern: that the Commissioner may have regard to –

*any material (including material not forming part of the provision of the \*taxation law) that would assist in ascertaining the purpose or object of the provision*

It seems odd to confer on the Commissioner greater latitude to look beyond the terms of the Act than is currently conferred on a judge under the *Acts Interpretation Act 1901*.

We note that there appears to be an error in s. 370-10(b) which refers to s. 13 of 'the *Legislation Act 2003*.' We take it this should be a reference to s. 13 of the *Legislative Instruments Act 2003*.

The other constraints on the Commissioner's power to act – the Commissioner forming an opinion that a modification is reasonable and receiving confirmation about budget implications – do not seem to us so cumbersome that the ATO will in practice simply ignore the power. But we note there must be some danger that the ATO will adopt a stance that is less willing to interpret and administer legislation sensibly than is currently the case, insist that matters must be routinely handled through the new procedure, but the new procedure proves to be slow and cumbersome. This would be a most unfortunate outcome from a process that is meant to be helpful to taxpayers and the administration. Again, it will be important to monitor experience with this regime as to how these changes work in practice.

Yours sincerely



**Andrew White**  
Director  
Greenwoods & Herbert Smith Freehills

+61 2 9225 5984  
+61 439 255 470  
andrew.white@greenwoods.com.au