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Dear Mr. Reid

Submission on Tax Laws Amendment (2016 Measures No.1) Bill 2016: Commissioner's Remedial Power – Exposure Draft

We refer to the Exposure Draft for the Tax Laws Amendment (2016 Measures No.1) Bill 2016 concerning the Commissioner's remedial power (Exposure Draft) and the accompanying Explanatory Memorandum (Draft EM) released for public comment on 4 December 2015.

PricewaterhouseCoopers (**PwC**) is thankful for the opportunity to provide a submission in relation to the Exposure Draft, and welcomes the opportunity for continued involvement throughout the consultation process.

Observations

We observe that whilst the introduction of a statutory remedial power for the Commissioner offers potential benefits for taxpayers, given the scope, nature and potential effect of this power, stronger safeguards should be included in the proposed legislation to protect taxpayers.

The doctrine of the separation of powers is a critical consideration in these circumstances given that it is proposed that the Commissioner will essentially be granted powers that are typically appropriate for the Legislature.

There needs to be scope for review of the Commissioner's exercise of power. Accordingly we support the exercise of Parliamentary scrutiny to ensure that the Commissioner exercises the remedial power in the manner intended, and furthermore to ensure that the broader well-established principles around the rule of law are maintained.

We further observe that Parliament is responsible for making and amending legislation, and the existence of the Commissioner's remedial power should not be used to prevent or delay the Parliament in making appropriate periodic technical corrections to taxation laws. There is still a need to ensure that taxation laws are clear and appropriately drafted, consistent with legislative intention. We encourage Treasury to continue in its efforts to improve the design of taxation laws, which will reduce the need for technical amendments by way of the Commissioner's remedial power.

In this context, we set out below our key recommendations in respect of the Exposure Draft.



Recommendations

1. Sunset clause on the Commissioner's Remedial power

We note that the proposed section 370-15 in Schedule 1 of the TAA 53, as set out in the Exposure Draft provides a sunset clause in respect of a *determination* made by the Commissioner (to modify the operation of a provision of a taxation law).

In addition to this, there ought to be a sunset clause on the remedial power as a whole. We recommend that a sunset clause of three years be included in the legislation such that the Parliament is forced to review the practical use of the remedial power itself at the end of the specified sunset period.

The relevant Parliament Committee, probably the House of Representatives Revenue Committee, should approach the Inspector-General of Taxation (IGT) and request an independent inquiry into the exercise of the remedial power at the close of the sunset period to determine the effectiveness of the power and appropriate governance. The Inquiry should be directed at ensuring that there is transparency and consistency in the Commissioner's exercise of the remedial power. Then the Committee should deliberate itself and report to the Parliament.

We also suggest that once the law is enacted, the Australian National Audit Office (ANAO) should conduct an audit of a representative sample of cases where the remedial power has been exercised to assess whether there has been appropriate governance in this regard.

2. Judicial Review

We note that the Draft EM provides that:

"should an entity consider that the Commissioner's exercise of the Remedial Power extends beyond the limitations of the power provided in the law, they will be able to seek review by the courts."

The EM further notes that the Courts will ultimately determine whether the modification is inconsistent with the purpose or object of the provision.²

Whilst the commentary in the EM is helpful, there ought to be a provision in the legislation that specifically allows an affected taxpayer to pursue judicial review. We recommend the insertion of a provision which clearly states that a determination made by the Commissioner (and any legislative instrument made by the Commissioner in exercising his remedial power) under the proposed section 370-5 should be a reviewable decision under either the Administrative Decisions (Judicial Review) Act 1977 (Cth), or Section 39B(1) of the Judiciary Act 1903 (Cth).

3. No detriment rule

PwC notes that there is no specific, unambiguous assurance in the Exposure Draft that the scope of the determination would be restricted to exclude the remedial power from applying unfavorably to taxpayers.

¹ See paragraph 1.19 of the draft EM

² See paragraph 1.28 of the draft EM



While it would seem that the intention of the law is that the scope of the determination is restricted where a modification would produce a result for a particular entity (referred to as the first entity) that is less favorable than would have been the case had the relevant provision of taxation law not been modified, we are concerned whether the words of the proposed section 370-5(4) are sufficiently clear to achieve that appropriate outcome.³

Specifically the test appears to be a relative one whereby an entity's rights or obligations under a tax law are determined by reference to the rights and obligations of another entity.⁴ This may have the outcome that if a modification is unfavorable to all entities, it must still be applied. Also, it is unclear as to what constitutes "a less favorable result".

There ought to be a 'no detriment rule' included in the legislation which provides that no taxpayer should be disadvantaged as a result of a determination made by the Commissioner under the proposed section 370-5.

If you have any further questions regarding our submission, please do not hesitate to contact us on the numbers below.

Yours Sincerely,

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³ See paragraph 1.53 of the draft EM

⁴ See paragraph 1.52 of the draft EM