



Black Economy Division
The Treasury
Langton Crescent
PARKES ACT 2600

15 June 2018

Dear Sir/Madam

Increasing integrity of Commonwealth procurement process

PwC welcomes the opportunity to make this submission in relation to the Treasury Discussion Paper “Increasing the integrity of the Commonwealth procurement process” dated 15 May 2018 (“Discussion Paper”) which was released as part of the Government’s 2018-19 Federal Budget response to tackle the black economy.

PwC is a strong supporter of the need for greater transparency across our taxation system and supports the introduction of measures that aim to build trust in the system and maintain the integrity of Australia's tax base. A system for the tendering of Commonwealth contracts which includes a focus on whether a tenderer is suitably meeting their tax obligations aligns with this objective as it not only supports fairness in business and trade, but also aids in providing public confidence that Government is dealing with businesses that take their tax obligations seriously.

Put simply, having a requirement that a tenderer must have a satisfactory tax record should, by default, deter those unscrupulous business who have a history of black economy behaviour from engaging in a Commonwealth tender process.

However, any new process that will require a business to submit a Statement of Tax Record from the Australian Taxation Office when tendering for an Australian Government procurement should not be designed in a manner that inappropriately deters a business that does take its tax obligations seriously. Accordingly, we believe it is important to ensure the design and implementation of this process is appropriately balanced in light of the existing costs of doing business and the complexity of Australia’s tax system. Accordingly the principles of simplicity and fairness need to be front of mind in relation to system design.

In addition, it is important that there be an education campaign in the lead up to the start date of the new process so that all potentially affected business are aware of the new requirements and expectations.

Our specific comments on the issues raised by the Discussion Paper are considered in the attached Appendix.

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We welcome the opportunity to discuss our submission with you and to engage in further consultation as the specific measures are designed and refined. If you have any questions please contact Lynda Brumm on [REDACTED].

Yours sincerely

A handwritten signature in blue ink, appearing to read 'L. Sayers', written in a cursive style.

Luke Sayers
Chief Executive Officer
PwC Australia

A handwritten signature in blue ink, appearing to read 'Pete Calleja', written in a cursive style.

Pete Calleja
Australian Tax Leader
PwC Australia



Appendix

PwC supports the 2018-19 Federal Budget proposal to ensure businesses have satisfactory engagement with the Australian tax system as a necessary criteria for the acceptance of a tender with the Commonwealth. Having a process that provides confidence to the Australian public that the Australian Government is transacting with business that are doing the right thing when it comes to taxation matters is becoming increasingly relevant in the current economic and social environment.

Since most businesses do the right thing when it comes to their tax obligations, the proposed approach should be a process that is designed so as not to unduly disadvantage the majority who do the right thing. It is implicit that having a requirement that a tenderer must have a satisfactory tax record will, by default, deter those unscrupulous businesses which may have otherwise tendered for government work and not have a satisfactory tax record.

In summary, our key comments relevant to the main design elements of the proposal are as follows:

- The process needs to be simple for business to understand and adopt.
- New businesses, including foreign entities, should not be disadvantaged simply because they have no Australian tax history.
- Small entities to which the Voluntary Tax Transparency Code does not apply (i.e. those with less than A\$100 million aggregated turnover) should not be disadvantaged simply because they do not adopt the Code.
- The process should not create unnecessary compliance burdens on business and the Australian Taxation Office (ATO).
- The requirement for a satisfactory Statement of Tax Record initially should only apply to the actual tender party.
- A system that requires the request to the ATO for a Statement of Tax Record to be made and received directly by a business is necessary to ensure that there are “no surprises” before a business submits a tender.
- The timeframe for the ATO to issue a Statement of Tax Record once requested should be agreed and as short as possible.
- There needs to be a suitable education and awareness campaign to ensure that businesses which may potentially consider the opportunity to tender for a government contract are fully aware of the new requirements.
- The system and related new processes need to be ready well before 1 July 2019 as some businesses may actually seek to apply for a Statement of Tax Record before 1 July 2019 in readiness for potential procurement opportunities from 1 July 2019.

Who needs to have a satisfactory tax record?

One elementary issue which needs to be made clear with this proposal is who is required to have the validation of having a satisfactory tax record.

We submit that it should be the actual tender party who will be legally contracted that needs to have the Statement of Tax Record from the ATO. However, in the case of a tender party that is a subsidiary member of an Australian tax consolidated or multiple entity tax consolidated group (where income tax obligations solely rest with the head company of the group), the income tax obligations of the head



company of the group in which the tender party is a member will be relevant. In addition, it needs to be acknowledged that a tender party's goods and services tax obligations may lie with the registered GST group.

Beyond the tax consolidated or GST group entity, extending the requirement to shareholders or other related or associated entities will add an additional layer of complexity and compliance and have the potential to raise significant new additional compliance and privacy issues.

We suggest however that appropriate integrity checks will be needed to prevent for instance, "phoenix" operators from setting up new entities which have no tax history, being able to obtain a satisfactory Statement of Tax Record.

When it comes to subcontractors that the applicant may need to engage under a particular procurement contract, if the subcontractor is known at the time of the tender, and the subcontractor's contract value is likely to be more than the A\$4million threshold, a Statement of Tax Record should also be required for the subcontractor. Where this is not known at the time of the tender, the successful tender party could be obligated to ensure that for any subcontract in excess of the A\$4 million threshold, the subcontractor is required to submit to the Government their Statement of Tax Record.

Once this system becomes bedded down, it may transpire that some businesses voluntarily seek a Statement of Tax Record to provide to non-government procurement clients as a means to bolster their standing and reputation across the non-government sector.

What is a satisfactory tax record?

Acknowledging that tax law is complex, particularly in Australia, we agree that the benchmark for a satisfactory tax record should not be set as requiring a "perfect" tax record. Instead the benchmark should be of a sufficient standard that can objectively indicate that the relevant business is engaging with the tax system in a generally acceptable manner.

It will be extremely important that all businesses are aware of the hallmarks of a "satisfactory" tax record against which this requirement will be benchmarked and that this should to the greatest extent possible be assessed on *objective criteria*.

It is perhaps far easier to determine when an individual or entity does **not** have a satisfactory tax record. Where the procurement work is to be undertaken in Australia, this would include:

- Failing to have a tax file number
- Failing to register for Australia's goods and services tax system as required
- Having multiple tax returns outstanding for lodgment
- Having multiple Business/Instalment Activity Statements outstanding for lodgment
- Failing to pay outstanding tax debts in the absence of an ATO agreed payment plan

Based on our experience in engaging with our clients (as their tax agents or tax advisers) and the ATO, in a complex tax environment, many taxpayers are exposed to at least one of the following at any given time:

- Being subject to a current or past review, audit or other inquiry by the ATO
- Having an amended assessment issued by the ATO

- Having an assessment that was, or remains, subject to dispute, i.e. under objection or appeal
- Having reported an uncertain tax position in the entity's financial accounts or reported in a Reportable Tax Positions schedule lodged with the ATO
- Having an ATO agreed payment plan to discharge outstanding debts including those applicable to disputed tax-related liabilities
- Having made voluntary disclosure or taken advantage of any amnesty that the ATO has offered¹ in relation to historic shortfalls
- Having sought and obtained an extension of time to lodge an income tax return, Activity Statement or other return
- Being subject to shortfall penalties² or scheme penalties³
- Lodging a return late that has reported no actual tax liability (e.g. a tax loss or a tax refund position)

The existence of any of the above circumstances alone should not automatically disqualify a business from having a satisfactory tax record.

Paying all taxes on time and lodging all relevant income tax returns, fringe benefits tax returns, excise returns, PRRT returns and/or Activity Statements on time are hallmarks of a taxpayer with a *perfect* tax compliance history. However, when it comes to determining the extent to which the late lodgment or the late payment of tax obligations might still be able to constitute a satisfactory tax record, it is our experience with our clients that sometimes such obligations are not always able to be met, even with the best intentions, due to circumstances outside of the taxpayer's control.

Accordingly, perhaps it might be appropriate to consider the question of whether a taxpayer has satisfactorily met its on-time lodgments objectively determined by reference to whether late lodgment penalties have been imposed by the ATO, after taking into account instances of full remission by the Commissioner, in at least a certain minimum percentage of cases for the applicable taxpayer.

A similar mechanism could be adopted to determine whether there has been a satisfactory history of on-time payment of tax liabilities - for example, an objective determination by reference to whether tax debts have been satisfied within an acceptable period, or tax debts have been discharged on time for at least a certain minimum percentage of cases.

We submit that the *minimum objective criteria* that any business - whether existing or proposed and whether Australian or foreign - that is seeking to tender for procurement work to be undertaken in Australia, should have in the context of a satisfactory tax record are the following:

- a tax file number and Australian Business Number
- registration for Australia's goods and services tax system.

In addition, for those businesses which have operated in Australia previously, meeting a pre-determined benchmark for:

- On-time lodgment of the annual income tax returns

¹ Currently, the ATO has an amnesty in relation to superannuation guarantee shortfalls.

² Imposed under Subdivision 284-B of Schedule 1 of the Taxation Administration Act 1953

³ Imposed under Subdivision 284-C of Schedule 1 of the Taxation Administration Act 1953 and applicable to Part IVA arrangements or transfer pricing



- On-time lodgment of activity statements (which may be as regular as a monthly obligation for some taxpayers)
- On-time lodgment of the annual fringe benefits tax returns (where applicable)
- On-time lodgment of excise returns (where applicable), and
- On-time payment of all tax related liabilities

for the last four completed tax years would be considered reasonable objective hurdles to be met in order to be considered to have a satisfactory tax record. In addition, an objective criteria would be no conviction for a failure to keep records⁴.

Obviously lodgment and payment history benchmarks cannot apply to any new businesses which has no tax compliance history.

In our view a self-declaration that a business will comply with their tax obligations in the future serves no meaningful purpose, without any legal repercussions if the tenderer was successful.

Difficulties will also emerge for the ATO validating a taxpayer's record in respect of its foreign tax obligations (this will be relevant to both foreign and Australian multinationals). It would also be difficult to precisely state all potentially relevant foreign tax obligations potentially applicable to the determination of a satisfactory foreign tax record. As such, in the interests of efficiency for purposes of a procurement process, a business could be asked, as a minimum, to make a self-declaration that they have not been convicted of any criminal or civil offence in relation to their offshore tax obligations.

Although PwC supports a Voluntary Tax Transparency Code, in the context of this proposal it must be recognised that the Code does not apply to all business and it should not be used to create an embedded bias as part of a procurement process to those larger corporate entities that might be expected to have adopted the Code. In particular, the Code was designed to encourage greater transparency through increased public disclosure of tax information by businesses within the corporate sector which have an aggregated turnover of at least A\$100 million. Non-corporate entities with aggregated turnover of at least A\$100 million are not precluded from adopting the Code if they so desire. Mandating that tendering entities with aggregated turnover of less than A\$100 million must adopt the Voluntary Tax Transparency Code in order to be considered to have a satisfactory tax record would potentially create an undue unnecessary compliance burden for some entities, and would not necessarily mean that the entity does in fact have a satisfactory tax record. Furthermore, ascertaining whether or not an entity has adopted the Code is a matter of public record which should not require any additional consideration or validation checks in the context of the provision of a Statement of Tax Record.

In addition, we would support a requirement that the tender party should make a self-declaration that it is not in the business of promoting tax schemes that are not reasonably arguable. In relation to those who are in the business of providing tax advice, the self-declaration should be supported by appropriate systems, internal controls and policies in place to identify any potential incidence of the promotion of tax schemes that are not reasonably arguable.

Process for obtaining statements from the ATO

We support the adoption of an on-line system to enable business to apply for and receive the statement from the ATO in a short time frame. An automated system not only allows for timeliness, but no doubt this will enable digital checks to validate the agreed objective benchmarks. It is acknowledged that

⁴ Under section 8L of the Taxation Administration Act 1953



there may need to be some manual intervention in some instances for the ATO to perform manual validation checks.

Some other observations regarding the process for obtaining a statement are:

- An applicant should be able to seek a Statement of Tax Record at any time, without having to disclose to the ATO the specific details of any proposed procurement opportunity. As noted earlier, some taxpayers may potentially seek to obtain a Statement of Tax Record to provide to their business partners.
- A Statement of Tax Record should have a set period of validity from its date of issue (e.g. valid for a period of no more than 12 months).
- It is important that an applicant who will receive a Statement which will indicate an unsatisfactory tax record has the opportunity to readily engage with the ATO directly (ideally before the Statement is issued) to resolve any erroneous outcomes or understand the basis for the Statement without undue additional process that causes excessive delay.
- The issue of an unsatisfactory Statement of Tax Record should not preclude the applicant seeking another Statement at a later time (as specified).
- The process for seeking a Statement of Tax Record, whilst being simple and efficient to access, should be secure enough to restrict access to information to those with the relevant authority within the organisation to do so.

How the statement will be used

We agree with the observations made in the Discussion Paper concerning the limitations on the use of the Statement of Tax Record and the basis on which it is issued.

When it comes to the detail that is provided on the Statement of Tax Record that is provided by the ATO, it is our view that it should be a simple statement of overall validation from the ATO that the applicant has a satisfactory tax record which was based upon the applicable objective criteria which are stated on the document. There may be merit to supplement the validation with specific qualifications or comments such as:

- This taxpayer is a new entrant to the tax system and does not have any tax compliance history.
- This taxpayer operates offshore and the ATO cannot validate that all foreign tax obligations have been met.