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8 December 2022

The Treasury
Tax Administration Unit, Not-for-profits and Tax Administration Branch
Personal and Indirect Tax, Charities & Housing Division
Langton Cres
PARKES ACT 2600

By email: TaxAdministrationConsultation@treasury.gov.au

Dear Sir/Madam

Strengthening the ABN system

1. This submission concerning Strengthening the Australian Business Number (**ABN**) system is made by the Taxation Committee and SME Committee of the Business Law Section of the Law Council of Australia (the **Committees**).
2. In summary, while the intent is appreciated, the result may be some weakening of the ABN system, and an increase in disputes, for no net gain when there are existing laws that already make adequate provision to deal with the concerns. The Committees are not aware of any proven case for the additional third-party impacts of this proposal, nor are they aware of any information about how the additional dispute load will be resourced.
3. The Committees understand that the intent of the proposed amendments is to seek to improve compliance with the existing obligation to file returns under the income tax system.
4. The proposal is to introduce an ability for the Commissioner of Taxation (the **Commissioner**), as registrar of the Australian Business Register (**ABR**), to withdraw an ABN from a business.
5. The first element is that, if a business did not update records on the ABR, the Commissioner as registrar could withdraw the ABN. This seems a relevant criterion for withdrawing an ABN because it goes to the integrity of the register. However, the Committees suspect that the same people who neglect other aspects of their affairs may be confronted with deregistration. The solution proposed (de-registration) may be disproportionate in its effect in many cases.
6. The second element is withdrawal of registration on failing to lodge two income tax returns. The Committees appreciate the intent of the proposal and do not condone non-compliance with income tax laws.
7. The real question is whether this is the best way to achieve the desired outcomes.
8. We consider that the proposal contains practical elements that require further work, which might lead to another, more effective course being chosen. There are existing

tools to enforce compliance with income tax laws. There is no reason why the usual administrative penalty system applicable to failure to update other registers would not be effective with the proposed new requirement to update the ABR.

9. As to income tax returns, there is a proposal to amend section 18 of the *A New Tax System (Australian Business Number) Act 1999* (Cth). It would include a further ground upon which an ABN may be cancelled. Failing to file two income tax returns is the trigger.
10. This duplicates the work already done, both formally and informally, by the existing income tax system. Specifically, already:
 - (a) It is an offence not to file an income tax return when required: section 8C of the *Taxation Administration Act 1953* (Cth) (***Taxation Administration Act***).
 - (b) The magistrate routinely makes an order under section 8G requiring the defendant to comply with the tax law requirement.
 - (c) Failure to comply with that Court order merits further penalty under section 8H.
 - (d) An accumulation of such offences quite quickly may merit imprisonment, under section 8E.
 - (e) Independently of the Court, there are administrative penalties, which the Commissioner can impose for late return, under section 286-75 of Schedule 1 to the *Taxation Administration Act*.
2. These are formal, direct enforcement avenues already available to the Commissioner.
3. In most cases, the Commissioner will already have written to the taxpayer about non-compliance. Thus, there will have been informal prompts within the taxation system in a majority of cases, seeking compliance. The idea is that simple lapses can be (and are) remedied informally, and there is the real prospect of prosecution for ongoing non-compliance.
4. No case is made that the existing enforcement mechanisms are ineffective.
5. No case is made that the impact of withdrawing an ABN on third parties is merited.
 - (a) This would be an untested intrusion into the Goods and Services Tax (**GST**) regime, by withdrawal of registration from a trader.
 - (b) Since traders, perhaps in ongoing relationships or contracts, rely on each other having ABNs, the Committees do not see how suspending ABNs is the optimum enforcement route for one trader's delinquency in failing to file a document or failing to update a register.
6. This indirect means of enforcement, now proposed, may impose costs and penalties on other taxpayers, who unwittingly are affected by the withdrawal of the ABN.
7. The Committees are concerned at the effects on the integrity of the GST system, in circumstances where:
 - (a) a taxpayer who, not unnaturally, wishes to continue running a business and is compelled to be registered for GST, nevertheless cannot be registered for GST without an ABN. The taxpayer must cease business and will be unable to render tax invoices for work done to date;

- (b) those to whom the taxpayer has made supplies may unwittingly be caught up, finding only after the event that they are suddenly dealing with an unregistered business. There would be:
 - (i) The denial of input tax credits.
 - (ii) A penalty for unwittingly not withholding under the no-ABN withholding system.
 - (iii) Costs of consequent civil and administrative disputes both between traders, and between traders and the Commissioner.
- 8. The Committees are not privy to the budgeting exercise behind these measures, but alerts Treasury to the need to provide resources to deal with the third party impacts, as well as the impact of disputes directly with the Commissioner.
- 9. Finally, the impact of the proposed measures would overwhelmingly fall on the smallest businesses, often reliant on small accounting firms to maintain compliance. Many of the cases members have seen, where a person becomes non-compliant, are actually induced by personal issues, such as mental health issues of the trader or their accountant.
- 10. A trader must nevertheless comply with the law. The trader should get back to compliance, and the existing tools already push in that direction.
- 11. Since it can be expected that, in practice, no one will pay against an invalid tax invoice, and no one will engage with a trader who is unregistered, withdrawal of an ABN will deny the cashflow needed to get back to compliance.
- 12. In summary, the objectives sought, of seeing an accurate register, and of seeing timely compliance with tax obligations, are worthy.
- 13. The means, in this proposal, have wider implications for the trading community surrounding any particular taxpayer. The taxpayer, itself, will be unable to trade, and may receive no sales proceeds (as it can be expected that no one will deal with someone without an ABN, regardless of the possibility of withholding).
- 14. The Committees understand that Brazil has an indirect enforcement mechanism similar to the one proposed, but the Committees have only limited details, since the source materials are in Portuguese. What the Committees understand is that traders are registered on the CNPJ with a registration number. A trader will ask another trader, before a deal, for a certificate that the other trader has no indebtedness (**CND**).
- 15. However, the Revenue (**RFB**) will give a negative report where there has been a failure to file. While some negative reports are more easily solved, there is now a significant level of dispute with RFB about failure to give CNDs. Treasury may wish to make enquiries of the RFB through its usual channels, if it has not already, so that design elements can be reviewed against any relevant foreign experience.
- 16. In any event, if the proposal were to go ahead in its current form, the Australian Taxation Office (**ATO**) should be resourced to deal quickly with non-compliant taxpayers seeking advice as to how to put themselves in a state of compliance.
- 17. The ATO should be resourced to quickly resolve objections and reviews, where there is remaining disagreement.

18. Further, resources should be provided for the Small Business Taxation Division of the Administrative Appeals Tribunal, which is designed to triage and resolve many small business issues, where many applicants are under-resourced and self-represented. It might reasonably be asked whether disputes about this topic would have much merit, but a small business that suddenly finds itself unable to trade and cut off from sales proceeds, will pull every lever.
19. Commitment of such additional resources would be unnecessary if the simpler solution, of enforcing the existing laws through existing means, were followed through.

Conclusion and further contact

11. The Committees would be pleased to discuss any aspect of this submission.
12. Please contact the chair of the Taxation Committee Angela Lee at angela.lee@vicbar.com.au, chair of the SME Committee Bruce Collins at bruce@taxcontroversypartners.com.au or Taxation Committee member David Marks KC at dmarks@qldbar.asn.au if you would like to do so.

Yours faithfully



Philip Argy
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