Law Council
OF AUSTRALIA

Business Law Section

18 January 2022

Director
Tax Administration Unit
Individuals and Indirect Tax Unit
Treasury
Langton Cres
PARKES ACT 2600

By email: taxdebtconsultation@treasury.gov.au

Dear Sir/Madam

Treasury Laws Amendment (Measures for Consultation) Bill 2022: Increased Tribunal powers for small business taxation decisions

1. This submission concerning Treasury Laws Amendment (Measures for Consultation) Bill 2022 (**the Bill**) is made by the Taxation Committee and SME Committee of the Business Law Section of the Law Council of Australia (the **Committees**).

2. The Administrative Appeals Tribunal Liaison Committee of the Federal Litigation and Dispute Resolution Section of the Law Council of Australia also endorses this submission.

Government Policy Intention

3. On 8 May 2021, the Treasurer, Attorney-General and Minister for Employment, Workforce, Skills, Small and Family Business announced the policy intent underpinning the Bill in a joint media release titled "Making it easier for small business to pause debt recovery action".

4. The media release states in full:

> *As part of the 2021-22 Budget, the Morrison Government will allow small businesses to apply to the Administrative Appeals Tribunal (**AAT**) to pause or modify Australian Taxation Office (**ATO**) debt recovery actions where the debt is being disputed in the AAT.*
>
> *Currently, small businesses are only able to pause or modify ATO debt recovery actions through the court system, which can be costly and time consuming.*
>
> *Applying to the AAT instead of the courts will save small businesses at least several thousands of dollars in court and legal fees and as much as 60 days of waiting for a decision.*

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Small business can now have the confidence and peace of mind that they will be able to pause ATO debt recovery actions until their case is decided by the AAT.

Specifically, the changes will allow the Small Business Taxation Division of the AAT to pause or modify any ATO debt recovery actions, such as garnishee notices and the recovery of General Interest Charge or related penalties until the underlying dispute is resolved by the AAT.

Taking these disputes out of the courts will let small businesses get on with what they do best.

Small business entities (including individuals carrying on a business) with an aggregated turnover of less than
$10 million per year will be eligible to use this streamlined approach. The change will bring Australia more into line with the tax systems of the United Kingdom and United States.

These new powers for the AAT will be available in respect of proceedings commenced on or after the date of Royal Assent of the legislation.

5. Further policy detail was announced in the Treasury Budget paper No 2 (Receipt Measures), which states:

   *The Government will extend the power of the AAT to pause or modify ATO debt recovery action in relation to disputed debts that are being reviewed by the Small Business Taxation Division (**SBTD**) of the AAT.*

   This measure will take effect from the date of Royal Assent of the enabling legislation.

   Small business entities that file an application in relation to tax matters before the SBTD of the AAT on or after the commencement date will be able to apply for a pause or modification of the Commissioner's debt recovery actions, until the underlying dispute has been decided by the AAT.

   When considering applications, the AAT will be required to consider the potential effect on the integrity of the tax system and ensure that applications are in relation to genuine disputes.

   This measure will provide an avenue for small businesses to ensure they are not required to start paying a disputed debt until the matter has been determined by the AAT.

   This measure is estimated to result in a small but unquantifiable decrease in receipts over the forward estimates period.

6. The Committees support the Government's policy intention and wish to make submissions about the drafting of legislation to give effect to the Government's stated policy intention.

7. Further, the Committees note Recommendation 11 of the House of Representatives 2018-19 Commissioner of Taxation Annual Report dated 20 October 2021, namely:

> ***Recommendation 11***
>
> *3.75 The Committee recommends that the Australian Taxation Office ensure that debts are not payable by the tax payer until a final determination is made by the relevant dispute body or court. If the Australian Taxation Office fears that funds will be removed during an enforcement action, it should apply as all other plaintiffs do for a court ordered injunction.*

8. The tenor of this recommendation is aligned to the Government policy intention in respect of the AAT's power to stay and is suggestive that the approach should not be unduly restrictive on taxpayers in obtaining the protection of a stay. The 'The Standing Committee on Tax and Revenue properly notes that the Commissioner may apply for an injunction to protect the revenue, in addition to such other powers as may be available to the Commissioner.

Current AAT Power of Stay

9. The Committees consider that, if the restriction under s 14ZZB of the *Tax Administration Act 1953* (Cth) (**TAA 1953**) were removed, the current power of the AAT to stay a proceeding is largely adequate to give effect to the Government policy as it would apply to matters in its Small Business Tax Division. To make good this point, the Committees wish to make submissions as to the current law to show that the AAT would, if simply enabled to exercise its current power, be able to give full effect to the Government policy intention.

10. Specifically, in making a stay decision under the current law, the AAT will:

    a. Take account of the risk to a business taxpayer that, if a stay is not granted, that the collection of the tax debt may damage or destroy their business before they get a decision from the AAT;

    b. Consider public interest factors such as protecting the integrity of the tax system and ensuring that the power of stay is only exercised in cases of genuine disputes.

11. As the submissions as to the current law are detailed, they are set out in the Appendix.

Deficiencies in Draft Legislative Amendments

12. The Committees submit that the draft legislative amendments to s 14ZZH in proposed paragraph (3A)(b) are unnecessary in order to give effect to the Government's policy intention having regard to the current powers of the AAT under s 41of the *Administrative Appeals Act 1975* (Cth) (**AAT Act**), as explained in current authorities (see **Appendix**).

13. Paragraph (3A)(b) however undermines the Government policy because it is likely to make it too hard and costly for a taxpayer to ever get a stay. This outcome

defeats the Government's intention to introduce measures, as stated in the Treasurer's media release, that will make "it easier for small business to pause debt recovery action".

14. The Committees draw attention to several drafting deficiencies.

15. First, it is inevitable that staying the recovery of a tax debt that is otherwise due and payable will necessarily have some impact on the administration of taxation laws and the tax system. Unless the legislation provides that this mere fact alone does not justify refusal of a stay, then the AAT may be obliged to refuse every stay based on the draft legislation.

16. Second, as currently drafted, the taxpayer will bear the burden of proving matters that are not within its knowledge or command, namely about the "overall taxation system", "the Commissioner's administration of a taxation law" and "the integrity of the taxation system". These considerations are very broad in nature and are matters that solely rest within the knowledge of the Commissioner of Taxation. As a result, this proposed burden on the taxpayer will be very hard to discharge and costly to even attempt to discharge unless the Commissioner consents to the stay application. The main objective of the legislative changes is to make it easier for a taxpayer to obtain a stay, when the Commissioner may otherwise be unwilling to delay debt collection under existing ATO policies. Requiring a taxpayer to effectively obtain the Commissioner's consent to any such stay seems entirely inconsistent with that stated policy objective.

Preferred Approach

17. The Committees' primary submission is that paragraph (3A)(b) be omitted. It is unnecessary, as the current power of the AAT under s 41 AAT Act will secure the Government's stated policy intention.

18. If it was thought necessary to make amendments to place such conditions on the exercise of the AAT's power of stay, it is suggested that:

    a) The burden of proof in respect of the matters in subparagraph (3A)(b)(i) and (ii) be placed on the Commissioner, who is the only party able to discharge the burden of proof;

    b) Retain subparagraph (3A)(b)(iii), although it is quite unnecessary as it largely restates part of the current test that there is a serious question to be tried.

Draft Explanatory Memorandum

19. The draft Explanatory Memorandum refers to a range of ATO Practice Statements and proposes requiring (at para 1.16) the Tribunal to act 'consistently with the principles underlying the LAPS'. The Committees argue that this would both unduly fetter the independent role of the Tribunal and conflict with the intended aim of the proposed new policy.

20. The Committees note that the content of the existing draft Explanatory Memorandum should also be amended to reflect the preferred approach advocated above, given that the draft expands on the implications of the proposed

section (3A)(b), in ways that we suggest appear to conflict with the stated policy intention.

Support for the proposed policy change

21. The Committees note with some concern recent suggestions that the Commissioner may now be more likely to seek to commence proceedings for recovery of debts while the underlying liability may be subject to a meritorious dispute under Pt IVC of the TAA 1953 than was previously the case, see[1]:

> *Dr Orow also relied on the practical difficulty a taxpayer might confront if pressed to bankruptcy as a result of recovery proceedings even while pursuing review or appeal proceedings under pt IVC. The prospect of the provisions operating in a harsh manner has long been acknowledged. Moreover, whereas Mason ACJ was informed in Clyne that it was 'somewhat unusual' for the Commissioner to commence proceedings for recovery in reliance on a notice of assessment which is under challenge in what are now pt IVC proceedings, Mr Hanks candidly informed us that this is no longer the case.*

22. In light of such comments from senior counsel for the Commissioner, the Committees strongly endorse the ultimate purpose of the amendments as described by the Treasurer and other Ministers about "Making it easier for small business to pause debt recovery action".

Contact

23. The Committees would be pleased to discuss any aspect of this submission.

24. Please contact the chair of the Taxation Committee Angela Lee at angela.lee@vicbar.com.au or Chair of the SME Committee Bruce Collins at bruce@taxcontroversypartners.com.au, if you would like to do so.

Yours faithfully

Philip Argy
Chairman, Business Law Section

[1] *Deputy Commissioner of Taxation v Danny Buzadzic* [2019] VSCA 221, per Kyrou, McLeish and Niall JJA, at para 73 (footnotes omitted).

Appendix

Current Power of the AAT to Stay

1. The AAT has long had a power of stay in s 41 of the AAT Act. That power however has also been disabled in relation to reviewable tax objection decisions since 1991 under s 14ZZB AAT Act, when the objection and appeal provisions were transferred into Part IVC of the AAT Act.

2. Nonetheless, the AAT has generally exercised the power of stay in cases other than tax reviews.

3. The general judicial approach for a stay or interlocutory injunction is that there is a serious question to be tried and that the balance of convenience favours the making of the order.[2]

4. A leading case on the exercise of the power of stay under s 41 is the decision of Downes J, also sitting as President of the Tribunal, in *Scott v ASIC* [2009] AATA 79 (***Scott***).

   In *Le'Sam Accounting Pty Ltd v Tax Practitioners Board* [2020] AATA 890 (***Le'Sam***), Deputy President McCabe, at 12, said that *Scott* provides a useful guide to the approach to stay cases, having regard to the circumstances of each case.

5. In *Scott*, Downes J stated, at 4, the considerations to be:

   1. The prospects of success.

   2. The consequence for the applicant of the refusal of a stay.

   3. The public interest.

   4. The consequences for the respondent in carrying out its functions depending upon whether a stay is granted or not.

   5. Whether the application for review would be rendered nugatory if a stay were not granted.

   6. Other matters that are relevant, amongst which Downes J stated would include the length of time that the ban has already been in place and the gap between the date of judgment and the hearing of the application. [3]

6. These considerations were recently applied in *Leahy v Tax Practitioners Board (Taxation*) [2020] AATA 2164 at 8, the Tribunal noting, at 9, that the Applicant has

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[2] *Castlemaine Tooheys Pty Ltd v State of South Australia* (1986) 148 CLR 140 per Mason CJ [153-154]; also *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board* (1982) 46 ALR 398.

[3] Also applied in *Leahy v Tax Practitioners Board (Taxation*) [2020] AATA 2164 at 8, noting at 9 that the Applicant has the practical onus of establishing on the evidence that the above considerations point to the grant of a stay.

the practical onus of establishing on the evidence that the above considerations point to the grant of a stay. [4]

7. In respect of the prospects of success, Deputy President McCabe in *Le'Sam* observed, at 13, in considering a stay application, "rough and ready assessments of the merits will be required" and that "an obviously strong case will weigh in favour of a stay" but an "obviously weak or fanciful case will weight against a stay." In *Iseppi and Tax Practitioners Board* [2020] AATA 1523 (*Iseppi*) at 12-13 Deputy President McCabe said that, whilst the assessment of prospects is rarely clear cut, to grant a stay the Tribunal should be satisfied that the case is arguable.

8. As explained in the Full Federal Court decision in *ASIC v AAT* (2009) 263 ALR 411 (***ASIC v AAT***), s 41(2) of the AAT Act requires the AAT to form an opinion and take into account "the interests of any persons who may be affected by the review" and the identification of those interests will come from the statutory scheme.[5] The majority noted the importance of the AAT resolving competing interests.[6]

9. In a context very close to taxpayers seeking review of objection decisions, the AAT has in a number of recent Tribunal decisions recognised the importance of the preservation of the general community's confidence in tax agents as being of fundamental concern.[7] Those who hold a position of trust as a tax agent should conduct their affairs in a way which maintains public confidence. [8] Nonetheless, the Tribunal should consider the particular circumstances as to whether a stay is in the public interest.

10. In *Dekanic and Tax Agents' Board of NSW* (1982) 6 ALD 240 (***Dekanic***), Davies J observed that there may be public interest factors for or against a stay. At 242, His Honour refers to the dislocation of clients of the Applicant if a stay is not granted. Conversely there may be other cases where the dangers to the public would warrant refusal of a stay. Whilst those circumstances did not exist in *Dekanic*, an example is in the case of *Thomson* [9] in which the Tribunal decided it was in the public interest to refuse to stay a decision of the Board to deregister an Applicant who had failed to disclose convictions and a sentence of imprisonment in his application for registration.

11. In the decision of *Shi v Migration Institute of Australia Ltd* (2003) 78 ALD 281 (***Shi***), Tamberlin J, referring to the text of s 41(2), observed at 286 that the subsection is framed in a way that is in broad general terms and by reference to a specific purpose. He then said "(t)he power is to make an order which stays or otherwise affects the operation or implementation of a decision."

12. His Honour went on to state at 287:

> *It is evident that if a decision favourable to an applicant is made by the AAT in relation to the application to renew, then the agent in this case will have been wrongfully deprived of the opportunity to earn his livelihood from that*

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4 See also *Yvonne Anderson and Associates Pty Ltd v Tax Practitioners Board (Taxation)* [2020] AATA 1181 at 41.
5 At 423-424 per Downes and Jagot JJ.
6 Ibid
7 *GJ Brown & Co Pty Ltd and Tax Practitioners Board* [2016] AATA 740 at 82.
8 *Evans and Tax Practitioners Board (Taxation*) [2019] AATA 1408 at 131.
9 *Re Thomson and Tax Agent's Board of Queensland* (1993) 30 ALD 747.

time up to the time of the favourable determination. There may also be damage to his practice and reputation. There is no provision for recovery of this loss or for any disruption to the practice, or loss of reputation or goodwill. A favourable decision to the applicant by the AAT would also mean that the applicant had been wrongfully refused registration and these are important considerations: see the remarks of Davies J in Re Dekanic …

13. He continued at 287-288:

> *If the applicant in the present case is not granted a stay, the effectiveness of the hearing and determination of the application for review will be diminished. In summary, I consider that s 41(2) of the AAT Act must be given a broad interpretation.*

14. In *Duncan v Companies Auditors Liquidators Disciplinary Board* [2006] 93 ALD 401 (***Duncan***), Emmett J, in a decision concerning s 41 of the AAT Act, found that s 41 extended to staying the publication of a notice in the gazette. His Honour reasoned, at 405, that there was no public benefit in notice of suspensions being published in the Government Gazette before its validity had been resolved.

15. The approach in *Duncan* and *Shi* was approved by the majority of the Full Court of the Federal Court in *ASIC v AAT* [10] who found that the AAT power under s 41(2) to make orders relating to publication of a banning order, extends to a media release.[11]

16. In *CASA v Hotop* (2005) 87 ALD 551 (***CASA***),[12] Sipois J dismissed an appeal by CASA against a decision of the Tribunal to stay a decision of CASA to cancel the Applicant's Air Operator Certificate on the day it would otherwise have expired. CASA's argument was rejected that the s 41 stay order effectively was an impermissible positive order to grant the Applicant a new AOC. His Honour said at 559:

> *… the argument advanced by senior counsel for the applicant, would substantially undermine the tribunal's capability to provide effective relief in cases where the operation of the impugned decision would result in the applicant for review having to cease carrying on an existing business pending the hearing of the application for review. The difficulties facing a review applicant that is not allowed to continue in business pending the hearing of an application were described by Tamberlin J in* Shi*.*
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> [His Honour then quoted with approval the passage cited above of Tamberlin J that referred to *Dekanic*].

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10 At 428 per Downes and Jagot JJ.

11 Ibid at 428, 431.

12 Followed in *A v Minister for Immigration, Citizenship and Multicultural Affairs* (2018) 265 FCR 446 at 450 per Mortimer J; *Transcon Holdings Pty Ltd and Aged Care Quality and Safety Commissioner* [2020] AATA 90 paragraph 26; *Van Dieren and ASIC* [2019] AATA 4777 paragraph 47; *Wong and Secretary, Department of Health* [2019] AATA 5313 paragraph 23.