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Dear Jacky

### Strengthening the ABN system

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to provide comments on *Exposure Draft Treasury Laws Amendment (Measures for Consultation) Bill 2022: Strengthening the ABN system* which proposes to enact a recommendation from the Black Economy Taskforce to provide the Registrar with the power to cancel an Australian Business Number (ABN) when:

- Two or more income tax returns are outstanding, or
- Annual confirmation of details and the need to hold an ABN is not received by the Registrar.

### Executive summary

CA ANZ supports efforts to ensure that Australian businesses are complying with their tax and superannuation obligations. A well-maintained and current ABN register assists consumers, businesses and government agencies to check details and obtain relevant information about Australian enterprises in a timely manner. It is also important for businesses to keep their tax return and other obligations up to date.

While, in principle, the reforms seem sensible, CA ANZ recommends that:

- Red tape be reduced by legislating to allow the Australian Taxation Office (ATO) and Australian Charities and Not-for-profits Commission (ACNC) to transmit the specified annual confirmation details from existing forms that need to be lodged with those organisations to the ABN registrar so that there is no need for an *additional* form.
- Safeguards be inserted into the legislation to require that the ABN recipient be advised in writing at least 28 days before cancellation of an ABN warning them of the possible cancellation unless the specified issues that warrant cancellation are addressed – this could be by the ATO if it relates to non-lodgement of returns or the ABN Registrar.
- Greater clarity of 'arrangements to lodge' be provided.
- The commencement date of these measures be delayed until 2026 to:
  - minimise administrative costs by integrating these changes once into the Modernising Business Registers (MBR) program rather than twice; once as a standalone measure then one that is later integrated into the MBR; and
  - allow ABN holders, especially self-managed superannuation funds (SMSFs), sufficient time to ensure that their income tax return lodgements are up to date.
- A discretion to reinstate an ABN be introduced into the legislation.

- A review of the operation of the existing ABN legislation be undertaken, especially regarding the impact of a 2-year imprisonment for misuse of an ABN and the impact of an ABN being cancelled then reinstated back to the date of cancellation on both the ABN recipient and people who deal with the ABN recipient.
- Communication campaigns, both in anticipation and implementation of the legislation, that clearly state the impact of these changes

## Red tape

Across government, there should be a single source of truth about a business drawn from a single form that is lodged at least annually to confirm and to advise changes to the details of a business. The intent of the MBR Program is to build a platform that can house all registers relating to businesses and the professionals that support them.

The requirement that a notification be made to the ABN Registrar in an **approved form** specifically, and only, for an ABN duplicates notices required to be provided to ASIC for corporations and details provided in tax lodgements by all businesses and in ACNC forms by charities and not-for-profit entities. Requiring entities to lodge another form providing information that already exists in government systems is wasteful and imposes unnecessary compliance costs on ABN holders. The dramatic impact on a business if there is non-compliance with this additional form, will have a particularly harsh impact on small businesses and not-for-profit entities.

It is recommended that the details required to ensure that the ABN register is up to date be transmitted from the ATO and ACNC to the ABN registrar automatically so that compliance costs are minimised. If such processes are currently conducted manually, the government should allocate an amount for IT systems to be built to allow this information to flow electronically between the various government entities.

Due to tax privacy laws, the Commissioner is properly limited in their ability to divulge tax information to the Registrar. Consideration should be given to whether consequential amendments are required to enable the necessary information sharing to occur between the Commissioner and the Registrar to minimise compliance costs.

## Need for safeguards

The potential ramifications of cancelling an ABN are significant. They include:

- Inability to issue a valid tax invoice which means that their customers cannot claim an input tax credit.
- Certain customers being required to withhold 47% of payments under the no-ABN withholding regime.
- Being in breach of certain State and local government licencing/regulatory requirements which require an entity to have an ABN.
- Inability to access government assistance.<sup>1</sup>
- Triggering of adverse provisions in commercial and financial contracts.

Most of these consequences negatively impact a business's cash flow and will make trading difficult, potentially leading to financial distress and tipping some into insolvency. It is therefore important that safeguards and broader whole-of-system thinking should be incorporated into the design of the proposed measure before it is legislated.

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<sup>1</sup> This was illustrated in *Commissioner of Taxation v Apted* [2021] FCAFC 45 (Allsop CJ, Logan and Thawley JJ) where even the retrospective reactivation of the ABN to 1 July 2019 was found not to meet the requirement that the business "had an ABN on 12 March 2020" within the meaning of s 11(6) of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) (CERP Rules) for the purposes of entitlement to JobKeeper payments.

Even with the safeguards suggested below in place, cancellation of an ABN should only occur if there is “sign-off” by a senior, well-briefed ABRS official.

### Safeguards for tax return lodgements

There is already a penalty for late lodgement of an income tax return and the Commissioner of Taxation (the Commissioner) has additional powers to seek lodgement of outstanding returns. Cancellation of an ABN by the Registrar is a high-impact action against the ABN holder and should only be undertaken when alternative forms of engagement have been unsuccessful.

The Registrar can only know to act when notified by the ATO, meaning that the process of identification, treatment, and referral by the ATO of ABN holders with two or more tax returns outstanding becomes critical.

The interaction between these provisions and the ATO’s Lodge and Pay strategies including lodgement prosecutions needs to be clear. A referral by the Commissioner of Taxation (the Commissioner) to the Registrar should be properly considered and include:

- A reasonable basis to expect the ABN holder has a requirement to lodge
- Reasonable efforts made to ascertain or confirm ABN holder details for service
- Demonstrated efforts to seek lodgement from the ABN holder
- Consideration of the compliance history and circumstances of the ABN holder
- Consideration of the potential impacts of cancellation on the ABN holder.

An obligation on the Commissioner to seek tax return lodgement through a formal notice to both the taxpayer and their tax agent (if applicable) prior to referral to the Registrar should be included in the legislation. The requirements of this notice should include a warning that the ABN could be cancelled, an outline of the consequences that flow from that cancellation, and the date of cancellation. This ensures that proper efforts have been made by the ATO to contact the ABN holder and clearly notify them of their obligation, rather than merely relying on the annual legislative instrument. Such information could be incorporated into existing ATO correspondence.

### Safeguards about annual updates

There are a range of situations where ABN holders are unlikely to receive Australian Business Register (ABR) correspondence and will be unaware of their obligation. These include:

- Business details have changed since registration, but they have not notified the ABR
- Address for service may no longer be valid due to a change in directors, agents or other representatives
- Foreign businesses and non-resident taxpayers can be particularly hard to track
- ABN holders who are disengaged, often temporarily, due to personal, business and/or financial difficulties.

Consideration should be given to inserting in the legislation a requirement that after the 12-month period has elapsed, the Registrar make reasonable efforts to identify alternative contact details and seek to engage with the ABN holder at least 28 days before deciding to cancel the ABN.

### Arrangements to lodge – greater clarity

The draft provisions refer to the ABN holder being required to have “made arrangements to lodge” to either avoid cancellation or seek reinstatement. There is a lack of clarity as to what is meant. Is it confined to the ATO providing a deferral of time to lodge? Or would engagement with the ATO and an expressed intention to lodge suffice?

For clarity, guidance should be issued as to whether the lodgement of a “return not necessary” or “further returns not necessary” notification is sufficient to satisfy the lodgement requirement or whether a tax return is required.

Similarly, clarity will be required as to whether the ATO will notify the Registrar when an arrangement has been made to lodge, or if the onus remains on the ABN holder to present information to ABRS staff for their consideration. An automatic and immediate notification system from the ATO to ABRS is preferred.

## Delayed commencement date

A delayed commencement date of 2026 is desirable for two reasons:

- To minimise implementation costs by implementing once not twice
- To allow taxpayers to get their tax returns up to date

### Implementing once not twice

We recognise the importance for the ABR to hold accurate information to give confidence to consumers, commercial partners, regulators and government that they are dealing with a compliant genuine entity. The consolidation of registers under the MBR provides the opportunity to introduce efficient and simple registration processes. As existing registers are moved to the Australian Business Registry Services (ABRS) platform businesses will need to provide a single, annual, confirmation of details and notify any changes as and when they occur. Other government agencies will then rely on the ABRS as the source of truth and draw on this information as required

Therefore, we consider that this limb of the measure may be best deferred to be incorporated into the broader MBR Program, rather than introducing another form for the 7.5 million ABN holders who are already struggling to meet all government compliance requirements.

At this stage, the commencement date of 1 July 2024 no longer aligns with the timeframes for the broader MBR Program which has been extended to 2026.

### Getting tax returns up to date

It is highly desirable that taxpayers, especially those in business, are up to date with their tax returns. CA ANZ understands that some SMSFs and businesses impacted by COVID or natural disasters may have recently experienced difficulties in being up to date. If there is an issue with lodging a particular tax return or the financial accounts that relate to that tax return, then tax agents are unable to lodge subsequent tax returns due to the way ATO systems operate.

Resolving issues with financial accounts can take a substantial amount of time which means that there may be a large cohort of SMSFs or businesses that have two or more tax returns outstanding.

A delayed commencement date accompanied by an extensive education campaign about these proposed changes are needed to ensure that these entities have time to lodge tax returns and retain access to their ABN. Alternatively, consideration could be given to allowing the retention or reinstatement of an ABN if there is an arrangement in place to lodge outstanding returns by a particular date.

## Need for reinstatement discretion

There is no discretion for the Registrar to reinstate the ABN until outstanding returns are lodged. Consideration should be given to including an exception that allows the Registrar to reinstate in circumstances where the Commissioner confirms that lodgement action has been withdrawn.

## Review of existing ABN legislation

The ABN legislation was introduced in 2001 as part of the GST laws. Much has changed since then.

For example, the past 20 years has seen significant changes in how businesses communicate. Increased digitalisation and automation of business processes will continue. Accounting packages, especially those that are e-invoiced enabled, automatically look up ABN registrations and check that they are valid before issuing payments. The increasing digitalisation of government also means that cancellation and reinstatement of ABNs can happen in real time.

The ABN provisions (section 19 of *A New Tax System (Australian Business Number) Act 1999* (ABN Act)) currently operate so that when a cancelled ABN is reinstated, it is reinstated back to the date of the cancellation.

If a third party has used software during the time that the ABN is cancelled, then they may have withheld amounts according to the ABN withholding provisions. How the reinstatement of an ABN retrospectively will affect this obligation is unclear and should be considered in light of evolving business practices.

The important role of the ABN is reflected in the penalty of 2-year imprisonment for purporting to use an ABN that is not your own or purporting that a number is an ABN (section 23 ABN Act). It is not clear whether the use of an ABN that has been cancelled would fall within that provision. Whilst the penalty certainly sends a strong message about the misuse of an ABN, the harsh consequences of imposing the penalty may mean that this provision is not effectively enforced. Consideration should be given to whether having a broader range of penalties available would encourage greater enforcement of the ABN provisions.

For further information in relation to our submission, please Susan Franks, Senior Tax Advocate at CA ANZ ([susan.franks@charteredaccountantsanz.com](mailto:susan.franks@charteredaccountantsanz.com))

Yours faithfully,

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