

21 December 2018

Black Economy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Attention: Georgina Prasad

By e-mail: [blackeconomy@treasury.gov.au](mailto:blackeconomy@treasury.gov.au)

Dear Ms Prasad

## Improving Black Economy Enforcement and Offences

Chartered Accountants Australia and New Zealand (CAANZ) appreciates the opportunity to comment on the consultation paper “Improving black economy enforcement and offences” (the consultation paper).

The consultation paper canvasses a vast array of topics that substantially increase the powers of the Commissioner of Taxation. These topics include reversing the onus of proof, imposing travel bans and providing the ATO with direct access to telecommunications data. These topics deserve careful consideration – particularly in view of the Commissioner’s existing powers, alternative approaches (e.g. providing the AFP with specific funding to assist the ATO rather than granting the ATO direct access to telecommunications data), and impact on fundamental legal concepts such as natural justice and due process.

Unfortunately, due to the large number of consultations that were released with the same consultation deadline that also coincides with one of the busiest times of the year for accountants, CAANZ is unable to give a detailed response to this consultation that it clearly deserves. Given these circumstances, CAANZ can only offer preliminary views on this consultation paper.

Our preliminary views are as follows:

### Offences

There do appear to be gaps in the offence profiles available to law enforcement agencies in that the agencies are forced to choose between low level sanctions and expensive/risky litigation. The following initiatives in the consultation paper are worth pursuing further:

- Enhancing reviewable administrative penalties to target egregious tax offenders.
- Amending section 8ZE of the Taxation Administration Act 1953 to suspend all administrative penalties pending the outcome of criminal proceedings.
- Extending freezing orders from 3 to 14 days.

### Record-keeping for gambling winnings

Introducing enhanced record keeping requirements for gambling winnings could be seen as supporting the government’s existing policy of only allowing regulated gambling institutions to

operate in Australia (i.e. if only winnings from Australian regulated gambling institutions are treated as tax free). Substantial efforts will be required to educate those members of the public who gamble in hard to trace circumstances (e.g. casinos, race tracks).

### **Travel bans**

CAANZ has not had the opportunity to consider issues regarding travel bans and reserves the right to comment upon this should it be pursued by the government. This is a substantial weapon in the fight against tax evasion and must be exercised carefully and with due process.

We note that the ATO's existing powers to issue a Departure Prohibition Orders (DPOs) under Part IVA of the Tax Administration Act 1953 appear to be used cautiously and in accordance with clear internal guidance.

However, the Inspector-General of Taxation noted several stakeholder concerns with DPOs in his July 2015 report on ATO Debt Collection. These have been reproduced in Attachment A. It is recommended that Treasury discuss these concerns with ATO officials.

### **Sham contracting**

The proposals regarding sham contracting involve the Fair Work Act 2009 which is a piece of legislation that CAANZ does not usually comment upon.

That said, the wide disparity between the treatment of employees and contractors (tax, entitlements, occupational health and safety, super etc.), the increasing difficulty between distinguishing between an employee and a contractor and the rise of independent contractors suggests a more holistic consideration of how people engage in businesses and how such people are regulated needs to be undertaken by government.

For many years, CA ANZ has called on governments (both Federal and State) to create a firmer Australia-wide legislative foundation for distinguishing employee and contractor relationships. In the absence of such guidance, the incremental change suggested in the consultation paper of reducing the prosecution barrier from recklessly or knowingly engaging in sham contracting to one of reasonableness may only generate as many questions as it is meant to be resolving – for example, what is reasonable?

### **Reversing the onus of proof**

Reversing the onus of proof is a substantial and fundamental change to well established legal doctrines. At a broader level, it also raises the rights of a citizen vis-à-vis the State.

The consultation paper does not provide specific examples of where this is being considered or define what a black economy offence is. Nor does it provide overwhelming evidence of the need for such a change.

The consultation paper notes that gathering proof can be difficult and resource intensive. That however does not automatically mean that the onus of proof must be overturned. An alternative approach is to better fund and resource those agencies responsible for undertaking such action.

CAANZ does not support reversing the onus of proof.

### Accessing third party information and accessing telecommunications data

Both these proposals give the Commissioner of Taxation even more information-gathering power.

It is legitimate to ask whether the Commissioner's existing powers suffice.

In evidence to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (refer Submission 87 and supplementary answer), the telecommunications industry group Communications Alliance has listed the ATO and other revenue agencies amongst those who request access to communications 'metadata'<sup>1</sup>.

Although warrant-free access is generally limited to criminal law-enforcement agencies, many agencies (not just the ATO) are accessing information which telcos are obliged to keep under data retention rules, using either:

- s313(3)(d) of the Telecommunications Act 1997 (which refers to protecting the public revenue), or
- s280(1)(b) of the Telecommunications Act 1997 (which allows information to be disclosed if "the disclosure or use is required or authorised by or under law")

The consultation paper argues that such power is needed due to the slowness of the Australian Federal Police (AFP) in obtaining data for criminal proceedings and the need to work with the AFP.

Working with the AFP, which deals with criminal proceedings on a daily basis, provides a natural check and balance on the appropriateness of actions. Rather than further increase the already substantial power of the ATO and limit review opportunities to only one organisation, other solutions to the resourcing and time constraints should be considered – including increased specific purpose funding of the AFP and ATO to pursue such matters.

CAANZ does not support this initiative.

### Expanding Federal Court Circuit

Given the existing avenues to raise tax issues, it would be interesting to gain a further understanding of how the costs of establishing another legal avenue compares to the expected benefits.

### Making ATO law enforcement more visible and accountable

Although not directly raised in the consultation paper, the various proposals raise an important issue for the ATO: accountability and transparency of law enforcement powers.

To date, the unit within the ATO responsible for pursuing criminal matters has kept a low profile<sup>2</sup>. There is little mention of its activities in the Commissioner's Annual Report. Unlike other tax

<sup>1</sup> Refer:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/TelcoAmendmentBill2018](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/TelcoAmendmentBill2018)

<sup>2</sup> The relevant unit within the ATO is embedded in the innocuously named "Private Groups and High Wealth Individuals" unit.

agencies around the world – such as HMRC in the United Kingdom<sup>3</sup> and the IRS in the United States of America<sup>4</sup> – tax crime fighting is not publicly portrayed as a key operational responsibility of the ATO.

Importantly, HMRC’s website highlights the *safeguards* applicable to the exercise of HMRC’s criminal investigation powers<sup>5</sup>.

We think this is an important issue which the Commissioner of Taxation and his Executive team need to grasp and soon.

If the ATO is to be granted even *more* police-like powers, than the organisation should become much more transparent about how those powers are used and the rights of those against whom those powers are applied.

Note too that the ATO’s criminal investigation activities go far beyond Black Economy matters, and currently cover (for example) investigations into leaked information such as the Panama Papers, false R&D and deduction claims, and promoter penalty legislation. We also think ATO crime investigators will play an increasingly important role in countering elder financial abuse because of the ATO regulatory role for SMSFs.

CA ANZ also points out that the community has yet to see an ATO response to the enhanced tax whistleblower protection measures currently before Parliament.

Put simply, failure to bring the “ATO Crime Unit” out into the open as a key part of ATO administration risks claims arising in the future of unfair treatment, particularly from taxpayers pinged for some minor wrongdoing who are often heard to say: “Why me? What’s the ATO doing about the *real* crooks out there?”

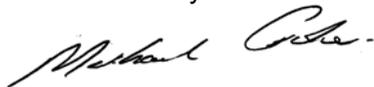
Greater visibility is also likely to enhance the deterrent effect on those contemplating illegal financial-related behaviour.

In the opinion of CAANZ, we would all benefit from shining more light on tax crime fighting.

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If you wish to discuss our comments, please contact Susan Franks on her mobile phone (+61 401 997 342) or via email at [susan.franks@charteredaccountantsanz.com](mailto:susan.franks@charteredaccountantsanz.com)

Yours sincerely



Michael Croker  
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Chartered Accountants Australia and New Zealand

<sup>3</sup> Refer: <https://www.gov.uk/government/publications/criminal-investigation>

<sup>4</sup> Refer: <https://www.irs.gov/compliance/criminal-investigation/criminal-enforcement>

<sup>5</sup> Refer: <https://www.gov.uk/government/publications/criminal-investigation/criminal-investigation>

## Attachment A

### Extract from Inspector-General of Taxation's Report on ATO debt Collection, July 2015<sup>6</sup>

#### Departure Prohibition Orders

4.70 Stakeholders have raised concerns with the ATO's use of DPOs to restrict their movement. They are particularly concerned, where taxpayers may be unaware or uninformed that they have tax debts outstanding until the ATO has issued a DPO. The significant costs of DPOs, particularly on foreign residents have also been noted by stakeholders.

4.71 Stakeholders were also concerned that the ATO did not take into account taxpayers' circumstances. For example, in one case provided in submissions, the ATO had issued a DPO to a taxpayer who required urgent travel overseas for family commitments. Despite attempts to engage with the ATO to provide security for the disputed debt as well as assurance of their return to Australia, the ATO's delay in responding created considerable anxiety and distress for the taxpayer.

4.72 Stakeholders have called for greater external control on the ATO's use of DPOs, particularly during the course of disputes. A number of suggestions have been proffered in this regard, including that the ATO should be restrained from issuing DPOs where there is a challenge to the underlying debt or that the ATO should be required to seek judicial approval before DPOs are issued as they are required to do when seeking to freeze taxpayer assets.

4.73 The ATO's use of DPOs has also been the subject of judicial review and has attracted substantial media attention in relation to high profile taxpayers

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<sup>6</sup> Source: Chapter 4, <http://igt.gov.au/publications/reports-of-reviews/atos-approach-to-debt-collection/>

## Appendix B

### Chartered Accountants Australia and New Zealand

CA ANZ is made up of over 120,000 diverse, talented and financially astute professionals who utilise their skills every day to make a difference for businesses the world over.

Members of CA ANZ are known for professional integrity, principled judgment and financial discipline, and a forward-looking approach to business.

We focus on the education and lifelong learning of members, and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.