



Australian Government

Inspector-General of Taxation
Taxation Ombudsman

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Senator Slade Brockman
Chair
Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Chair

Inquiry into the Treasury Laws Amendment (2020 Measures No 4) Bill 2020

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) welcomes the opportunity to make this submission to the Senate Economic Legislation Committee's (**Committee**) inquiry into the Treasury Laws Amendment (2020 Measures No 4) Bill 2020 (**Bill**).

The IGTO is an independent, Commonwealth statutory agency that investigates taxation administration systems and laws, as well as the actions and decisions made by Tax Officials - of the Australian Taxation Office (**ATO**) or the Tax Practitioners Board (**TPB**). The IGTO seeks 'to assure and ensure that there is fair, equitable, and transparent administration of the tax system consistent with community expectations.'¹ We also undertake tax investigations for the purpose of providing independent advice and assurance to Government on the taxation administration laws and systems.

The IGTO is not empowered to investigate or advise on tax policy matters. Accordingly, this submission does not make (or intend to make) comment on the appropriateness of the reforms set out in the Bill. Rather, we have reviewed the Bill and the associated explanatory memorandum and confined our comments to any potential tax administration concerns that may warrant the Committee's attention.

Our comments are focused on one area in particular, namely the retrospective application of rendering large scale generation shortfall refunds non-assessable non-exempt (NANE) income.

Schedule 1 of the Bill gives effect to the Government's corporate taxation measure announced during the Mid-Year Economic and Fiscal Outlook (MYEFO) on 16 December 2019², so that no tax is payable on refunds of large-scale generation certificate (LGC) shortfall charges made to electricity retailers and large industrial users of electricity. The Bill retrospectively applies to refunds of LGCs made on or after 1 January 2019.

¹ Inspector-General of Taxation and Taxation Ombudsman, *Corporate Plan 2021 – 2024* (2020) p 5
<<http://igt.gov.au/accountability-and-reporting/>>.

² Mid-Year Economic and Fiscal Outlook 2019-20, <https://budget.gov.au/2019-20/content/myefo/download/MYEFO_2019-20.pdf>.

The MYEFO measure noted:

The Government will amend the law to ensure that no tax is payable on the refund of large-scale generation certificate (LGC) shortfall charges. This measure will apply to refunds relating to all LGC shortfall charges including those charges already paid. This measure is estimated to have a cost to revenue of \$70.0 million over the forward estimates period.

Under the Renewable Energy (Electricity) Act 2000, liable entities (generally energy retailers) must surrender LGCs to meet their legal obligations or pay a non-deductible shortfall charge. Liable entities which pay the shortfall charge may apply to have the shortfall charge refunded if they surrender the outstanding certificates within the allowable refund period.

Legislating to ensure that no tax is payable when companies receive a refund of their shortfall charge will enable the market for renewable energy certificates to work as intended, meeting targets for clean energy while ensuring affordable electricity for consumers.³

The objects clause in section 3 of the *Renewable Energy (Electricity) Act 2000* is as follows:

The objects of this Act are:

(a) to encourage the additional generation of electricity from renewable sources; and

(b) to reduce emissions of greenhouse gases in the electricity sector; and

(c) to ensure that renewable energy sources are ecologically sustainable.

This is done through the issuing of certificates for the generation of electricity using eligible renewable energy sources and requiring certain purchasers (called liable entities) to surrender a specified number of certificates for the electricity that they acquire during a year.

Where a liable entity does not have enough certificates to surrender, the liable entity will have to pay renewable energy shortfall charge.

An exemption relating to one or more emissions-intensive trade-exposed activities may be taken into account in working out a liable entity's renewable energy certificate shortfall for a year. If it is, it will reduce the renewable energy shortfall charge otherwise payable.

We draw the Committee's attention to the IGTO's model of the features of good tax administration, which we developed and updated following engagement with, and feedback from, stakeholders.⁴ One aspect of that model is that the administration of the tax system should aim for simplicity and to minimise costs through minimising the compliance burden for both taxpayers and the ATO, minimising errors and mistakes, avoiding duplication and minimising red tape.⁵

The proposed measure clarifies that a refund of LGC shortfall charges will be treated as NANE income for tax purposes and appears to align with this principle. That is, by removing the need for liable entities to first pay the shortfall, then to apply for its refund after surrendering the relevant certificates within the period, and for the ATO to administer this program.

³ Above n 2, p 169.

⁴ Inspector-General of Taxation and Taxation Ombudsman, *Community Expectations for Tax Administration*, <<https://igt.govcms.gov.au/community-expectations-tax-administration>>.

⁵ Ibid.

Other principles in our Principles of good tax administration model also highlight that the community expects the taxation administration laws to be administered fairly, and in a way that provides certainty and consistency of taxation outcomes and that the tax collected and paid is correct.

In this regard, we note that the proposed taxation measure is intended to operate with a degree of retrospectivity (i.e. 1 January 2019). There may be circumstances where taxpayers who self-assessed their tax liabilities under the existing law are placed in a different tax position or are treated differently to those who self-assessed under the proposed law. Affected taxpayers may also experience uncertainties as to how they should act pending the passage of the legislation, and to deal with the practical implications of the enactment (for example, in relation to the requirement to lodge amendments, penalties and interest associated with under- or over-payment of tax).

On 20 December 2019 (and updated on 5 November 2020), the ATO published preliminary guidance on how it would administer this specific measure:

Administrative treatment

You should self-assess under the existing law.

If you choose to self-assess by anticipating the proposed law, it is not enacted and you understate your liability, you may be liable to GIC or SIC at the base interest rate.

However, if the law is enacted and you overstate your liability, you would generally be entitled to a credit amendment and interest on overpayment.

We will consider whether it would be an efficient, effective and ethical use of the ATO's limited resources to enforce compliance with the existing law where a taxpayer chooses to self-assess by anticipating an announced law change.

We will take all reasonable action to prevent the payment of incorrect refunds where allowing taxpayers to anticipate the announced change would be likely, at least in some cases, to result in refunds and we could reasonably identify the affected taxpayers before the incorrect refunds were paid.⁶

Similar advice is provided on the ATO's webpage concerning its administrative treatment of retrospective legislation.⁷

Given the nature of the electricity industry in Australia, we consider that there will be a small but nonetheless significant number of industry participants who will be affected by the proposed measure. As noted above, they may have already self-assessed on the basis that the measure will be enacted. Furthermore, given the revenue impact projections, it is likely that the amounts involved may be significant.

Having regard to the above, the Committee may wish to inquire with the ATO regarding its administrative actions to raise awareness with industry participants of the incoming measure, and how to prepare for the passage of relevant legislation, including:

⁶ Australian Taxation Office, *Removing the tax on refunds of large-scale generation certificate shortfall charges*, <<https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-for-businesses/Removing-the-tax-on-refunds-of-large-scale-generation-certificate-shortfall-charges/>>.

⁷ Australian Taxation Office, *Administrative Treatment of Retrospective Legislation* (10 December 2015) <<https://www.ato.gov.au/General/New-legislation/Administrative-treatment-of-retrospective-legislation/>>.

- whether it has, or can, identify the affected taxpayers and the scope of impact that this measure will have on them; and
- any planned administrative actions to ensure that taxpayers know what actions they may need to take to comply with the new law.

We trust this submission is of assistance to the Committee in its consideration of the Bill. If our office may be of any further assistance, please do not hesitate to contact me by email [REDACTED] or by phone [REDACTED]

Kind regards,



Karen Payne
Inspector-General of Taxation and Taxation Ombudsman