

12 March 2012

Ms Julie Owens MP  
Committee Chair  
House of Representatives Standing Committee On Economics  
Parliament House  
CANBERRA ACT 2600

By email: [economics.reps@aph.gov.au](mailto:economics.reps@aph.gov.au)

Dear Ms Owens

**Consultation on Schedule 7 to the Tax and Superannuation Laws Act (2012 Measures No.1) Bill 2012 – Proposed section 8AAZLGA of the Tax Administration Act 1953**

The Taxation Committee of the Business Law Section of the Law Council of Australia (**Committee**) thanks the Standing Committee for the opportunity to make a submission in respect of proposed section 8AAZLGA of the *Taxation Administration Act 1953 (TAA)* (**s.8AAZLGA**) contained in Schedule 7 of the Tax and Superannuation Laws Act (2012 Measures. No.1) Bill 2012 (**Bill**).

Schedule 7 to the Bill seeks to provide the Commissioner of Taxation (**Commissioner**) with discretion to retain refunds for the period required to undertake checks to verify the correctness of the amount claimed. The discretion would apply in relation to refunds and payments arising under all taxation laws that the Commissioner administers.

1. **SUMMARY**

The Committee acknowledges that the Bill incorporates a number of improvements over the previous exposure draft provisions. However, the Committee continues to have serious concerns that the proposed discretion of the Commissioner to retain funds has the potential to strain cash flows particularly for small businesses, compromise creditors, jeopardise the ability of businesses to secure continued finance, and will result in businesses struggling or failing to maintain solvency where the discretion is used inappropriately to withhold legitimate tax refunds. It will also create uncertainty for directors as to the status of entitlements and give rise to potential liabilities for insolvent trading.

As described in the Committee's previous submissions to Treasury of 22 February 2012 in relation to the exposure draft legislation for s.8AAZLGA, the provisions are a statutory form of Mareva injunction or freezing order without the checks and balances that are ordinarily required to obtain such an order from the courts and with the costs of the litigation having been shifted from the Commissioner to the taxpayer.

Private litigants are required to satisfy an independent judicial officer before they can place a freeze on another person's assets before proper entitlements to be paid are established. The proposed provision is fundamentally flawed in the breadth of the power it confers upon the Commissioner, providing him with a statutory mandate to withhold refunds from compliant, law abiding taxpayers to which they are legally entitled under the substantive provisions of the tax laws, and upon which they may be dependent for the continued operation of their businesses. Retention of a refund to which a taxpayer is entitled can have irreversible impacts on a business. An interruption to cash flow can produce domino effects that become uncontrollable and beyond remedy. Such difficulties are dealt with in freezing order contexts by requiring undertakings as to damages.

In addition to the general comments above, the Committee wishes to make comments on some specific aspects of the Bill. These are:

- (a) There is no time limit within which the Commissioner must commence verification of the refund.
- (b) There is no deadline for the verification process at which point the Commissioner must either release the refund or issue an assessment.
- (c) There is an inordinate amount of time before the taxpayer can start proceedings under Part IVC of the Taxation Administration Act 1953.
- (d) The taxpayer's right to object to the Commissioner's decision (the taxpayer's only remedy) to withhold is ineffective.
- (e) There is no positive obligation on the Commissioner to refund the amount as soon as he is satisfied that the amount is payable by the entity.
- (f) The form of the decision to withhold will create uncertainty for taxpayers.

The Committee's comments on these issues are outlined below.

## 2. **SUBMISSIONS REGARDING SCHEDULE 7 OF THE BILL**

### 2.1 **There is no time limit within which the Commissioner must commence the verification activity**

The measures have been introduced to "ensure that the Commissioner has the ability to verify refund claims before paying them to a taxpayer" (Page 72 of the Explanatory Memorandum to the Bill.)

However, at a practical level, the Commissioner could withhold the refund, notify the taxpayer and then do nothing further until he issues a request for information (which can be at any time). In this circumstance, the taxpayer would have no effective means of challenging any delay.

In the Committee's view, the provisions should be amended in order to require the Commissioner to request, at the time the taxpayer is notified that the refund will be withheld (usually within 14 days of when the relevant return was submitted) any information that he is aware will be required for the verification process. (This approach is similar to that taken in s. 46(4) of the *Goods and Services Tax Act 1985* (New Zealand) which, we understand from the Explanatory Memorandum, has been referred to in the drafting process.)

## 2.2 **There is no end date for the verification process at which point the Commissioner must either release the refund or issue an assessment**

The provisions provide no deadline for the verification process and timing by which the Commissioner must either release the refund or issue an assessment (or amended assessment, as applicable).

The Committee's preference would be for a fixed deadline of 30 days from the date of the initial notification to be incorporated into the provisions. This would keep the Commissioner accountable by forcing him to make a decision within a reasonable time period whether to release the refund or issue an assessment to the entity. In the Committee's view, a fixed deadline of 44 days or 60 days (depending upon to the initial notification period) from the date the relevant return is lodged should provide the Commissioner with sufficient time to conduct the verification activity and form a view as to the taxpayer's entitlement to the refund. In circumstances where the Commissioner requests information from the taxpayer and there is a delay in the taxpayer providing that information, the provisions could then extend the deadline to take account of that delay. The Bill already includes a provision to this effect in respect of the taxpayer's objection rights. A corresponding provision could be included in relation to the refund/assessment deadline.

The Committee also recommends the insertion of a provision allowing a taxpayer to consent to an extension of time for the Commissioner to retain the refund for an agreed period while he continues his verification process. This would benefit both taxpayers and the Commissioner, as:

- in circumstances where the taxpayer consents to an extension of time, the Commissioner can continue to conduct his verification activities as he sees fit; from the taxpayer's perspective, the pressures associated with objecting and appealing against an assessment/amended assessment under Part IVC are alleviated in circumstances where the taxpayer does not consider it immediately necessary to initiate that process; and
- in circumstances where the taxpayer refuses to consent to an extension of time, the Commissioner has two options, being that:
  - the Commissioner issues an assessment, whereby the taxpayer will bear the onus of proving its entitlement under Part IVC; the taxpayer will have the benefit of having its substantive entitlement determined under Part IVC with reference to an assessment/amended assessment without having to first initiate separate Part IVC proceedings solely in respect of the payment of the refund (i.e. the taxpayer will not be required to commence two costly and time consuming Part IVC proceedings); or
  - the Commissioner releases the refund where it is appropriate to do so and commence audit activity as appropriate with a view to recovering any overpaid amounts if and when the Commissioner reaches the view that the taxpayer's notification is incorrect.

## 2.3 **Time before which a taxpayer can effectively start Part IVC proceedings**

Under the provisions, the effective timeframe before a taxpayer can start proceedings (under Part IVC of the TAA) to challenge the Commissioner's

decision to withhold a refund for verification is approximately 194 days.<sup>1</sup> The Committee considers that this timeframe is inordinate, and is inconsistent with the findings of Jessup J and the Full Court in *Multiflex*<sup>2</sup>, which acknowledged the importance of the promptness of refunds in fostering a healthy business environment.

Additionally, the Committee considers that it is unfair for taxpayers to have to start Part IVC proceedings in order to obtain their refund entitlement. Rather, the Commissioner should be required to bear the expense and effort of commencing proceedings and establishing why he is entitled to withhold the amount. The Committee stresses that this is especially important as some taxpayers, particularly small businesses, will not have the financial resources to start legal proceedings.

#### 2.4 **The taxpayer's right to object to a decision to retain funds is ineffective**

The Committee considers that the proposed right of the taxpayer to object against a decision by the Commissioner to retain funds is an ineffective right. The taxpayer does not have the power to deal with the substantive issue of whether it is entitled to the refund.

Even if the taxpayer's objection to the Commissioner's decision is successful, the Commissioner has a general power (under the TAA) to issue an assessment. In that case, the taxpayer is forced to restart the objection process (although at least the process is then focused on the substantive issue of whether the taxpayer is entitled to obtain the refund). By the time that the matter reaches the objection stage, the taxpayer may well have suffered adverse financial consequences (or in the extreme, is insolvent). For this reason the Committee has proposed that the Commissioner be required to either release the refund or issue an assessment as discussed at 2.2 above, so that there is only the need for an objection to be lodged against the substantive issue and not against an administrative decision by the Commissioner.

One further practical matter is that the Commissioner is not required to give the taxpayer any reasons for the decision to withhold in writing. In the absence of any reasons for the decision to retain funds, it could be difficult for a taxpayer to object against the decision in any meaningful way (and in any way that would cause the ATO to revisit the issue properly during the objection phase).

#### 2.5 **There is no obligation on the Commissioner to refund the amount or part of the amount claimed as soon as he becomes satisfied that the amount or part of it is payable to the entity**

The provisions impose no positive obligation on the Commissioner to refund the amount or part of the amount claimed as soon as he becomes satisfied that the amount or part of it is payable to the entity.

The Committee considers that it is inappropriate that a taxpayer could be required to commence Part IVC proceedings or judicial review proceedings in order to

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<sup>1</sup> Under the provisions: Withholding for 14 days; objection within 60 days (or longer where the Commissioner requests further information); 60 days have to pass before the taxpayer can issue a notice under section 14ZYA requiring the Commissioner to make a decision on the objection, and after a further 60 days the Commissioner is deemed to have disallowed the taxpayer's objection).

<sup>2</sup> *Commissioner of Taxation v Multiflex Pty Ltd* [2011] FCAFC 142.

compel the Commissioner to pay a refund to which the taxpayer is entitled, in circumstances where the Commissioner has failed to act expeditiously or at all.

## 2.6 Form for notice of Commissioner's decision

Under the provisions, the Commissioner must inform the taxpayer of his decision to withhold "(by serving a document on the entity or by any other means)". "Any other means" includes a verbal notification.

In the Committee's view, this approach is unsatisfactory, especially taking into account the fact that, in the absence of the Commissioner giving a notification within the relevant time limit, he would be required to pay the refund (s8AAZLGA (5)(b)).

The Committee foresees a real practical issue in terms of the onus of proof placed onto the taxpayer in circumstances where the notification is provided verbally. For example, for a taxpayer who is represented by a tax agent, phone calls from the Australian Taxation Office (**ATO**) can and often do come to a number of different people, including the taxpayer and the agent, depending upon the currency of the ATO database and the person or persons listed as an authorised contact. It is currently unclear how a taxpayer would establish that they have (or have not been) given verbal notification of the Commissioner's decision. For example, would the taxpayer need to lodge a freedom of information request to obtain details of any transcripts recorded by the ATO?

As described in paragraph 4 of our previous submission to Treasury, the Committee submits that the provisions should specify that the Commissioner must inform the taxpayer that he has retained a refund, and that the Commissioner must do so in writing.

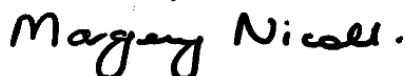
## 3. RECOMMENDATIONS

The Committee's recommendations for amendments to the provisions in Schedule 7 to the Bill can be summarised as follows:

- (a) The notification of the Commissioner's decision to retain funds must be given in writing.
- (b) The Commissioner must have a positive obligation to issue the refund as soon as he becomes satisfied that the amount owing or part of it is payable to the taxpayer.
- (c) There needs to be a deadline for the Commissioner to either pay the refund or issue an assessment (or amended assessment, as applicable) which the taxpayer can challenge, subject to the ability of the taxpayer to consent to an extension of time to allow the Commissioner to retain the refund pending further verification.

If you would like to discuss this matter, please contact the Committee Chair, Ms Teresa Dyson, on 07 3259 7369.

Yours sincerely,



Margery Nicoll  
**Acting Secretary-General**