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15 July 2009

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Dear Sir

“Extra-statutory” concession power for the Commissioner of Taxation

The Taxation Institute of Australia (**Taxation Institute**) welcomes the opportunity to provide comments on the *“Extra-statutory” concession power for the Commissioner of Taxation – Discussion Paper (Paper)* which was released for comment on 12 May 2009.

The Tax Design Review Panel has recommended to the Government that it consider whether the Commissioner of Taxation (**Commissioner**) should be given further power to modify the tax law to give relief to taxpayers, or whether there are preferable ways in which the Commissioner could provide extra-statutory concessions in appropriate circumstances.

1. General Comments

The Taxation Institute does not support the Commissioner having an extra-statutory concession power. Some of the Taxation Institute’s members believe that such a power would be beneficial as it could remedy anomalies and unintended outcomes in the law without the delays associated with legislative amendments and the uncertainty of relief announced in Government press releases. However, on balance, the Taxation Institute considers that the risks associated with giving such a power to the Commissioner outweigh the possible benefits.

In this regard, the Taxation Institute’s concerns with the Commissioner having an extra-statutory concession power can be summarised as follows:

- **Lack of certainty** – any system which allows the Commissioner to exercise an extra-statutory concession power to change or disregard the law will result in uncertainty for taxpayers. It will be difficult for taxpayers to determine what the current state of the law is.
 - For example, uncertainty will arise regarding whether taxpayers are permitted to apply the existing law or the “law” as per an exercise of the Commissioner’s extra-statutory concession power (**Lore**). Taxpayers will now have to consider the law and the Lore. This could be particularly problematic if the Lore was subsequently overruled by Parliament.
 - If the extra-statutory concession power is limited to providing relief to taxpayers, there will also be uncertainty regarding what will constitute “relief”. Further uncertainty may arise where the Lore provides certain taxpayers with relief but is

detrimental to others. In such circumstances, it may be unclear whether the Lore would be valid.

- ***Detrimental to certain taxpayers*** – from a tax perspective, a Lore could have opposite effects for different groups of taxpayers (ie a Lore which is advantageous to one group of taxpayers could be detrimental to others). Further, it will not always be apparent that a particular Lore is detrimental to a particular group of taxpayers. Hence, there is a risk that a Lore may be introduced by the Commissioner on the assumption that it provides taxpayer relief when in fact some taxpayers are disadvantaged by the Lore. The Taxation Institute considers that any such Lore should be invalid as, in the Taxation Institute's opinion, the making of the Lore would be an inappropriate use of the extra statutory concession power by the Commissioner and would be contrary to the rule of law.
- ***Weakens the rule of law*** – the tax system, like other aspects of the Australian legal system should be based on the rule of law. The Commissioner should not be able to vary or disregard the tax laws or defeat the intention of the Parliament as this would weaken the rule of law. The focus should be on amending taxation legislation in a timely manner rather than introducing stop gap measures. Our legal system should be based on the rule of law and not the exercise of one individual's power regardless of whether this power is used to provide taxpayer relief.
- ***Delay legislative process*** – giving the Commissioner an extra-statutory concession power may delay the introduction of amending legislation. The view might be taken that the Commissioner can fix the problem in the short term by introducing a Lore and hence the introduction of amending legislation will not be expedited or may not happen at all (eg if the Commissioner's actions are seen as sufficiently fixing the problem).

For all of the above reasons, on balance the Taxation Institute does not support the Commissioner having an extra-statutory concession power. Instead the Taxation Institute believes that any identified defects or problems should be speedily corrected by the amendment of the law.

2. Consultation questions

The Taxation Institute has provided further comments below in relation to each of the specific consultation questions raised in the Paper.

1. *Taking all the considerations into account, do you think the Parliament should give the Commissioner a power to vary the tax laws? What were the most important considerations in reaching your conclusion?*

The Taxation Institute does not consider that the Commissioner should have an extra-statutory concession power. The most important considerations in reaching this conclusion are outlined in section one above (ie the lack of certainty, the potential to be detrimental to taxpayers, the erosion of the rule of law and potential delays in the legislative process).

In addition, the Taxation Institute has serious concerns regarding whether the Commissioner would be able to exercise such a power in a timely manner. In this regard, the Paper uses the time difference between private rulings and amending legislation to conclude that the extra-statutory concession power would be quicker to change the tax law (refer paragraphs 40 and 41 of the Paper). The Taxation Institute considers that this logic is flawed. A private ruling is the Commissioner's interpretation of the current law. The exercise of the extra-statutory concession power allows the Commissioner to change or vary the law. As such, the resulting Lore is more akin to amending legislation rather than a ruling which interprets current law. If the same or substantially the same resources are required to draft appropriate amendments to the law, then there is no reason why the time differential should be significant.

Accordingly, the Taxation Institute considers that there is no evidence to support the conclusion that the exercise of an extra-statutory concession power by the Commissioner would be significantly quicker than introducing amending legislation.

For all of the above reasons, on balance the Taxation Institute does not consider that the Commissioner should have an extra-statutory concession power.

2. *Are there any other issues that should be taken into account in considering whether the Commissioner should have a power to grant extra-statutory concessions?*

Refer to the comments to question 1 above.

3. *Are there any other ways that defects in the tax laws could be fixed faster than by legislative amendment?*

The Taxation Institute considers that legislative amendment is the most effective way to rectify defects in the tax law. However, the Taxation Institute also acknowledges the timing issues associated with this process. Accordingly, the Taxation Institute recommends a review into the legislative process specifically in relation to taxation. Such a review could consider how tax law can be amended in a more effective and timely manner. In this regard, the Taxation Institute considers that minor amendment bills should be encouraged as a vehicle for processing legislative reform periodically.

The Tax Issues Entry System (TIES) should be continued even if an extra-statutory concession power is introduced. It will take time to determine whether the TIES system will be a viable system for facilitating legislative amendments to emerging problems or defects in the tax law.

4. *If the Commissioner were to have a power to vary the tax laws, should it follow the legislative instrument model or the discretion model? Are there any other models that should be considered?*

As noted above, the Taxation Institute does not consider that the Commissioner should have an extra-statutory concession power. However, if the Commissioner were to have such a power, the Taxation Institute considers that the legislative instrument model would be preferable. Guidance should be taken from the existing legislative instrument models that exist under the *Corporations Act 2001* and the *Superannuation Industry (Supervision) Act 1993*.

The alternative, being a discretion model, would create too much uncertainty and would erode the rule of law. A discretion model would allow the Commissioner to vary or disregard the law with no Parliamentary review. Although taxpayers with sufficient standing may be entitled to review by the Administrative Appeals Tribunal, this would not provide a sufficient level of scrutiny of the Commissioner (ie scrutiny would be reliant on taxpayers having the knowledge and finances to challenge the Commissioner).

The Taxation Institute considers that any legislative instruments executed by the Commissioner under an extra-statutory concession power should be subject to mandatory Parliamentary review according to the procedure set out in the *Legislative Instruments Act 2003* (refer paragraph 29 of the Paper). The Taxation Institute considers that Parliamentary review of legislative instruments executed by the Commissioner is vital to the protection of the rule of law.

The Taxation Institute considers that if a legislative instrument is disallowed by Parliament, it should still have effect from the time it was executed until the time it was disallowed if the relevant taxpayers choose to apply it. The element of taxpayer choice is essential given the uncertainty that will be created by giving the Commissioner an extra-statutory concession power and giving Parliament the ability to disallow legislative instruments executed by the Commissioner.

Further, the Taxation Institute considers that the legislative instruments should have a sunset clause which provides that they cease to be valid 12 months after it is tabled or after it is executed. This would render the fix only a temporary one and encourage the introduction of amending legislation to make the fix permanent rather than just temporary.

5. If the Commissioner were to have a power to vary the tax laws:

(a) Should it be a power to vary the law to achieve what the Parliament intended, regardless of whether it provides taxpayers with relief, or should it be limited to providing taxpayers with relief?

The Taxation Institute considers that the extra-statutory concession power should be strictly limited to providing taxpayers with relief. As noted above, any system which would allow the Commissioner to exercise an extra-statutory concession power in a manner which would be detrimental to taxpayers should be rejected.

Given the difficulties in determining whether all taxpayers will be given relief or one or more may be disadvantaged (ie because what may be advantageous for one group of taxpayers may be disadvantageous for others), taxpayers should have a *choice* whether to apply the law or the Lore. This choice should remain open in respect of the period ending with the expiry of the legislative instrument under which the Commissioner exercises the extra statutory concession power or its disallowance by Parliament or a relevant change to the law occurs.

The Taxation Institute does not consider that a limitation based on Parliamentary intention would be productive (ie where the extra-statutory concession power is limited to varying or disregarding law which departs from the Parliament's intention). In many instances, the areas of tax law where there are anomalies or unintended outcomes, the Parliament will not have explicitly considered the issue or expressed their intention.

Further, a limitation based on Parliamentary intention would add another level of subjectivity and hence uncertainty to the extra-statutory concession power. It is not clear but presumably it would be up to the Commissioner to determine the Parliament's intention. The Taxation Institute considers that it would be inappropriate to allow one individual (ie the Commissioner) to determine Parliament's intention. Further, the Taxation Institute considers that a limitation based on Parliamentary intention could be counterproductive from a timing perspective.

(b) Should there be any limits on what matters the Commissioner could vary and, if so, what should they be?

Refer to the comments in relation to question 5(a) above.

The Taxation Institute does not recommend limiting the extra-statutory concession power to certain areas of the law. If an extra-statutory concession power is to be introduced it should cover all areas of tax law (other than the setting of rates). Limitations can always be introduced at a later stage if it is considered to be inappropriate for the power to apply to certain areas of the tax law.

(c) What criteria should the Commissioner take into account in deciding whether, and how, to exercise the power?

The Taxation Institute considers that the Commissioner should consider the following issues when determining whether to exercise the power to introduce a Lore:

- what is the impact of the current law on taxpayers;
- do unintended outcomes or anomalies arise under the current law;
- how will the proposed Lore overcome any unintended outcomes or anomalies;
- which taxpayers will get relief from the proposed Lore;
- will any taxpayers be disadvantaged by the proposed Lore;

- will the Lore provide certainty for taxpayers; and
- is the Lore likely to be approved by Parliament.

(d) Should the Commissioner consult on all variations? If not, what criteria should be used to determine when there should, and when there should not, be consultation?

As a general proposition, the Taxation Institute considers that consultation is advisable in relation to any change in tax law. However, the existence of the extra-statutory concession power will only be valuable if it can be exercised on a timely basis. In this regard, it is noted that the purpose of the extra-statutory concession power appears to be to provide a practical remedy in a timely manner without the delays associated with passing amending legislation.

The Taxation Institute acknowledges that the potential benefits of timeliness associated with the extra-statutory concession power may be eroded by a lengthy consultation process. This would undermine the reason for having such a power in the first place. In many cases there would have been significant consultation usually in the form of representations by or on behalf of taxpayers prior to a decision being made by the Commissioner to proceed to implement Lore.

The Taxation Institute considers that to the greatest extent possible without placing onerous delays on the exercise of such a power, there should be consultation prior to any variation. That said, the Taxation Institute acknowledges that there may not always be time for consultation. That is why the Taxation Institute strongly recommends that taxpayers should be able to “choose” whether to apply the variation or not. Otherwise, the Commissioner may exercise the power without realising (ie because of the lack of consultation) that a group of taxpayers is disadvantaged by the decision.

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If you require any further information or assistance in respect of our submission, please contact Joan Roberts on 03 9611 0178 or the Taxation Institute’s Senior Tax Counsel, Dr Michael Dirkis, on 02 8223 0011.

Yours sincerely



Joan Roberts
President