



THE TAX INSTITUTE

22 February 2012

Ms Brenda Berkeley
The General Manager
Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: GSTadministration@treasury.gov.au

Dear Ms Berkeley

Consultation on Exposure Draft Legislation - Submission re proposed section 8AAZLGA of the Taxation Administration Act 1953

The Tax Institute and the Taxation Committee of the Business Law Section of the Law Council of Australia (together the **Professional Bodies**) thank the Treasury for the opportunity to make a submission in respect of proposed s. 8AAZLGA of the *Taxation Administration Act 1953* (**s. 8AAZLGA**).

Two observations are required at the outset: the first concerning consultation time frame and the second concerning the complete absence of appropriate checks and balances.

Allowing five working days in which to consult on measures of such profound importance to the rights of taxpayers is manifestly inadequate and has denied the broader community and industry the opportunity to consider and consult with the Treasury on these significant changes. This is particularly so given the previously unannounced application of the measure to taxes other than indirect taxes. The Professional Bodies consider that the implementation date of the measure for these other taxes should be deferred. The rushed timeframe is not consistent with Treasury's recent commitments to improved consultation frameworks following the recent Strategic Review of the Department.

In its present form, the proposed legislation is a statutory form of a Mareva Injunction or freezing order without the checks and balances that are ordinarily required to obtain such an order from the courts. 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. Moreover, in circumstances where the affected party is not informed of the material on which such an order is sought the greater the

care required. 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. We invite the Treasury to consider what the effects of this will be on Australian businesses if the provision is enacted as currently proposed.

While the legislation ought to be reconsidered and appropriate checks and balances added, the current text requires a number of vital amendments prior to legislation being tabled.

1. Section 8AAZLGA: Inappropriate in its current form

The Professional Bodies agree that, in light of the decision in *Commissioner of Taxation v Multiflex Pty Ltd* [2011] FCAFC 142 (**Multiflex**), new provisions are necessary in order to allow the Commissioner a reasonable time to retain refunds in appropriate circumstances, pending investigation as to the accuracy and legitimacy of refund claims. However, the breadth of this retention power must be balanced against the requirement for taxpayers to receive prompt payments of their refunds, in order to ensure the continued viability of their businesses and in recognition of their legal entitlements. The breadth of the retention powers must also be determined having regard to the extensive powers already granted to the Commissioner to protect the legitimacy of refund claims. It is the view of the Professional Bodies that the proposed amendments *do not* appropriately strike a balance between the interests of the Commissioner and the interests of the taxpayer in this regard.

We refer to the comments made by the Treasury representatives at the consultation of 17 February 2012 (**Consultation**) and understand the pressures on the Government in respect of meeting its commitments to deliver a budget surplus and, also, the necessity of protecting the revenue from fraudulent refund claims, which may increase in times of economic hardship. However, we submit that a healthy economy is entirely dependent on the survival of Australian businesses and in times of economic hardship it is all the more crucial that honest and compliant taxpayers are able to predict their cash flows, satisfy their creditors, secure finance, keep their businesses running efficiently and enjoy some measure of certainty and predictability in respect of their entitlements. This is consistent with the findings of Jessup J and the Full Court in *Multiflex*, where the importance of the promptness of refunds was acknowledged. These are the qualities of a healthy business environment and tax administration has a very important role to play to foster that environment and not to hinder businesses from claiming their legal entitlements.

In its current form, the scope of the power conferred on the Commissioner under s. 8AAZLGA is drafted widely as to allow the Commissioner to withhold refunds in circumstances where, we submit, it is inappropriate to do so. It is a provision that has the potential to strain cash flows, compromise creditors, jeopardise the ability of businesses to secure continued finance and that will almost certainly result in many businesses struggling or failing to maintain solvency where it 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. The

provision in its current broad terms will not, in the long term, have a positive impact on the budget or the economy where it is used, practically unchecked, to withhold refunds.

Further, these measures will undermine the integrity of the tax system as a whole. This is clearly demonstrated in respect of the impact of the provision on the GST regime, which was never designed as, or intended to be, a tax on businesses, but which will be fundamentally subverted in this regard if businesses are expected to continue to remit GST collected without receiving the refunds of GST and other taxes to which they are entitled.

We submit that, rather than imposing excessive measures that will interfere with the rights of compliant taxpayers to their tax refunds, the Government should refine the proposed measures in such a way that they are targeted specifically to circumstances where it is absolutely necessary to withhold to address a likelihood of recalcitrant behaviour or to address scenarios where notifications suggest a manifest clerical error on the part of the taxpayer. To the extent that refunds are withheld while straightforward verification checks are carried out, the time limit for withholding should be significantly reduced in order to mitigate interference with taxpayers' business activities. Further, there must be appropriate safeguards so as to allow taxpayers to take action against the Commissioner where refunds have been held inappropriately. This approach should be taken to foster a healthy business environment, which will in turn sustain a stronger economy. Such an approach is consistent with the reality, as acknowledged by the Australian Taxation Office, that the overwhelming majority of taxpayers make honest and conscientious efforts to comply with their taxation obligations.

Further, if the aim of the amendment is to prevent non-compliant taxpayers from obtaining a commercial advantage (or achieving competitive neutrality, as stated in the Consultation), this can be, and already is, achieved in a number of ways. The first is in the diligent exercise of audit and assessment powers of the Commissioner, and the imposition of appropriate penalties and the general interest charge upon the recovery of refunds incorrectly claimed. The Professional Bodies fully support conscientious administration by the Commissioner of the tax laws. To the extent that any refunds of tax are at risk of not being recovered, the objective can be achieved by targeting the refund retention provision to circumstances where the Commissioner suspects (as defined in broad terms) fraud, evasion or intentional disregard of a taxation law.

We set out below more specific comments in respect of the provisions and our recommendations as to how the provisions might be improved in order to achieve Government objectives of while protecting compliant taxpayers.

2. Drafting issues

Based on the discussion that took place at the Consultation, it is apparent that there is some dispute as to the proper interpretation of the provision as currently drafted. It is vitally important that any tax law that impacts on taxpayer rights as significantly as s. 8AAZLGA, is drafted with precision and clarity, to avoid costly disputes and future litigation to clarify meanings, but more importantly, so that both taxpayers and the Commissioner have certainty as to their rights and obligations under the law.

Further, we understand that in respect of several aspects of the provision, the approach we seek is the approach that the Treasury and the ATO intended, but is not

clearly expressed in the current drafting. We therefore make a number of recommendations, as set out below. We attach at **Annexure A** a revised exposure draft that reflects these suggested changes.

1. In ss. 8AAZLGA(1)(b) and (5)(b), substitute "the Commissioner is satisfied that it would be reasonable to require verification of the information that:" with "it is reasonable to retain the refund or part of the refund while the Commissioner investigates information that:" In addition, in ss. 8AAZLGA(3)(a) and (7)(a), substitute "the Commissioner becomes satisfied that it would no longer be reasonable to require verification of the information" with "it is reasonable to refund the amount or part of the amount"

We consider this change is appropriate for the following reasons.

i. ***Restores the position pre-Multiflex***

Our proposed wording effectively restates the test that the Commissioner had considered was implied in the legislation prior to the decision in *Multiflex*. If, as the Treasury has stated, this provision is intended to restore that position, then the test that is applied should be consistent.

ii. ***Reflects the intentions of the Treasury and the ATO***

At the Consultation, both the Treasury and the ATO representatives indicated that their preferred test is, in fact, whether it is reasonable to withhold in all the circumstances. This was reflected in the flow chart diagram distributed by the Treasury at the Consultation, which describes the test as, "is it reasonable to retain refund?"

However, these are not the words that have been used in the drafting of the provision, and there is disagreement as to whether this is the effect of the provision as currently drafted. If it is indeed the Treasury's intention that the provision requires one to consider whether it is appropriate to retain a refund in all the circumstances, there is no reason why the test should not state this explicitly.

We note that other provisions such as ss. 8AAZLGA(8) and (9) suggest that the test is as we have suggested that it should be expressed. This is because they proceed on the basis of the test being in the following terms "[i]n deciding whether to retain the amount..." and "[t]he entity may object to a decision of the Commissioner to retain the amount..."

iii. ***Reasonable to verify information or reasonable in all the circumstances?***

The emphasis of the current test is on the quality of the information in the notification, *not* whether it is appropriate in the circumstances to retain the refund; i.e. the test is focused on whether the information in the notification is such that it should be verified. For example, consider the following scenario:

- The Commissioner receives a business activity statement (**BAS**) with a claim that is so out of the ordinary as to be considered "suspect". It would be reasonable to require verification of the information in the

notification. The Commissioner notifies the taxpayer that he is investigating the refund as required by s. 8AAZLGA(2); however, the Commissioner takes no further steps to investigate the refund claim, or does not do so in a timely fashion.

- The 60 day period referred to in s. 8AAZLGA(3)(c), as extended by information requests, expires. The Commissioner continues to retain the refund on the basis that the information in the BAS remains suspect, and it would be reasonable to verify that information. The Commissioner notifies the taxpayer in accordance with s. 8AAZLGA(6) that he is continuing to withhold the refund.
- In the interim, the Commissioner retains similar refunds from the taxpayer that arise after the decision to retain the initial amount. Therefore, by the time the taxpayer is entitled to test the initial decision to retain the refund, the actual amount withheld by from taxpayer is a significant multiple of the initial refund.
- The taxpayer objects to the Commissioner's decision to retain the refund, per s. 8AAZLGA(9). However, the taxpayer's objection is denied on the basis that the information in the business activity statement is suspect and it would be reasonable to require its verification. All other considerations, including as to the timing of the investigations and detriment to the taxpayer's ongoing business activities are disregarded.
- The taxpayer commences proceedings under Part IVC in the Federal Court. However, the decision under review is whether, as a factual matter, the Commissioner is satisfied that it would be reasonable to verify the information in the BAS. The Federal Court cannot substitute the decision of the Commissioner in these circumstances. As the information in the BAS continues to be viewed as "suspect", the taxpayer is unable to *disprove* that the Commissioner is satisfied that it would be reasonable to investigate that information. However, no consideration is given to the broader factors involved, including as to the timing of the investigations and detriment to the taxpayer's ongoing business activities.

The taxpayer has no other right of review and no other means of preventing the Commissioner from withholding the refund indefinitely, as the Commissioner has an express statutory power with which to do so. We appreciate that the Treasury and the ATO take the view that the test would be interpreted so as to take into account broader factors that go to reasonableness; however, we are not confident that this will be the interpretation of the provision, if it is enacted in its current form. Moreover, as discussed at the Consultation, the term "verification" is undefined and its use suggests a high forensic threshold. The ordinary meaning of "to verify" is "to prove to be true, as by evidence or testimony"¹. We therefore propose that the wording be clarified in the manner we suggest above. This is consistent with Treasury's intention and with the manner in which the test was understood by the Commissioner prior to *Multiflex*.

¹ Macquarie Dictionary, 5th ed

Amending the provision in this way would also attach some utility to the Part IVC review and appeal rights that will be enjoyed by the taxpayer under s. 8AAZLGA(9), as the broader circumstances of the Commissioner's investigation will go towards the question of reasonableness.

iv. *Clarity as to an objective test*

The Treasury and the ATO both indicated at the Consultation that the test outlined at s. 8AAZLGA(1) and (5) is intended to be an "objective reasonableness test". We do not consider the words, "the Commissioner is satisfied that..." effectively demonstrate that intention. On the contrary, when examining whether the Commissioner has satisfied himself, it is necessary to ask whether "**he** addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and not the irrelevant considerations": *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] 78 CLR 353 [13] (bolding is emphasis added).

We submit that, if the test is intended to be objective, this should be communicated with greater clarity, as it is in our proposed wording, adopting the formulation of "it is reasonable to retain the refund." This proposed wording is also consistent with the implied power to retain refunds that the Commissioner read into the legislation prior to *Multiflex*.

It is particularly important that it is clearly communicated by the provision that the test is an objective one if the Part IVC review and appeal rights in s. 8AAZLGA are to be of any benefit to taxpayers, who would find it almost impossible to disprove, for the purposes of those proceedings, what was the Commissioner's subjective state of mind.

v. *Allows for partial release of refund*

It is self-evident that where only part of the refund is under investigation by the Commissioner, he should release the balance of the refund to the taxpayer.

2. The considerations listed at s. 8AAZLGA(8) should apply in respect of the first decision to retain the refund

We see no reason why the matters listed at s. 8AAZLGA(8) should not be taken into consideration in respect of the first decision to retain the refund. As stated by the Treasury representatives at the Consultation, "what matters will be taken into consideration if not those matters?" We consider that a proper statutory drafting approach would compel that those matters be listed in respect of the first decision to put the matter beyond doubt.

We strongly disagree with the Treasury's view as expressed at the Consultation that it is implicit that those same matters would be taken into account at the first instance, and reiterate our view that specifically omitting those considerations from the first decision making process results in the opposite conclusion being reached; i.e. that these matters must be considered in the second decision making process and not the first.

Further, we strongly disagree with the Treasury's comments that it is inappropriate to list these considerations in respect of the first decision to retain the refund because "it

is too early to know whether the taxpayer is involved in fraud or evasion". The considerations listed at s. 8AAZLGA(8) are extremely broad, even in the absence of (8)(f). There is nothing in the provision to suggest that if there is no evidence of fraud or evasion, the Commissioner would be compelled to release a refund. These considerations merely provide a broad framework in which the Commissioner should operate if he is going to impinge on a taxpayer's right to be paid a refund, and it is appropriate that these matters be taken into account when a decision is being made under s. 8AAZLGA(1). Also, an explicit requirement that these factors be considered by the Commissioner in reaching the first decision to retain the refund is consistent with the objectives of the Treasury and the ATO that the initial retention test be an objective test.

We reject the comment made by Treasury at the Consultation that it is appropriate to draft the provisions in this way because a taxpayer whose refund has been withheld under s. 8AAZLGA(1) might react negatively to the insinuation that the Commissioner suspects the taxpayer of fraud or evasion. There are many other factors listed in s. 8AAZLGA(8) that the taxpayer might consider relevant to the Commissioner's decision making process. If taxpayers have concerns as to any suggestion of wrongdoing on their part (which will be the case when a refund is withheld, regardless of whether specific criteria for withholding are listed), the Commissioner should deal with these concerns by being transparent and communicative in his dealings with taxpayers. Importantly, we stress the provision should not remain in its current form for the purposes of avoiding unjustified emotional responses on the part of taxpayers as that appears to be an entirely unacceptable basis for statutory drafting. The provision should be amended so that the considerations at s. 8AAZLGA(8) excluding 8(f) apply to the decision in (1), thereby giving the Commissioner some parameters in which to operate and taxpayers some insight into what factors are taken into account.

We consider s. 8AAZLGA(8)(f) to be unnecessarily broad, as it would allow the Commissioner to retain a refund in virtually any circumstances. Subsections 8AAZLGA(8)(a)-8(e) comprehensively cover all relevant considerations and 8(f) should be deleted.

3. Breadth of Retention Power and Unlimited Time Period

The provisions as currently drafted allow the Commissioner in excess of sixty days to undertake the simplest verification tasks. We understand that it is critical to the ATO's administrative processes that the Commissioner have the power to carry out integrity checks in respect of refund claims, including prior to the Commissioner having had the opportunity to determine whether there is reason to suspect fraud, evasion or some other recalcitrant behaviour. However, we consider that if the Commissioner is to be vested with such a broad power to withhold, it should be confined to a significantly shorter period of time than that which is currently contemplated under s. 8AAZLGA.

If the Commissioner considers it necessary to engage in a telephone discussion with the taxpayer to understand the circumstances of the claim, or to request basic documentation such as sale contracts or tax invoices, he should be compelled to request that documentation within 14 days of issuing the notice of refund retention to the taxpayer, not just to notify the taxpayer that he is withholding the refund. Certainly, he should be required to communicate to the taxpayer what would satisfy him as to the integrity of the claim. Following receipt of the requested information, the Commissioner should be compelled to act expediently, either to make a decision that it is reasonable

to further withhold the refund (taking into account the matters listed at (8)) or to pay the refund.

This can be achieved in one of two ways:

Option A: Shorten the initial retention period

Amend the period in s. 8AAZLGA(3)(c) to 14 days, refresh the period each time the Commissioner issues an information request and extend the period by the time taken by the taxpayer to respond. Within that 14 day period and with the benefit of the additional information provided by the taxpayer, the Commissioner can decide whether to retain the refund under s. 8AAZLGA(5).

We note that while the taxpayer will enjoy objection, review and appeal rights under Part IVC earlier than 75+ days, provided it is reasonable to withhold the refund in the circumstances, the taxpayer will be unsuccessful in challenging the Commissioner's decision. For example, if there is an outstanding request for additional information to be provided by the taxpayer, it is unlikely that the taxpayer will commence legal proceedings.

Such an approach would also meet the concern expressed by the Treasury at the Consultation that taxpayers could frustrate the ATO's verification of the refund claim during the retention period by being unduly tardy in responding to ATO information requests (notwithstanding that it is in taxpayers' interests, not the ATO's, to respond as promptly as possible to information requests).

Option B: Insert an additional retention period

In addition to the current periods currently contemplated by the provision, insert a 14 day initial period of retention in which the Commissioner can withhold in any circumstances, but restrict the Commissioner's capacity to withhold beyond 14 days if he has no reason to believe the notification is inaccurate.

If the Treasury does not consider it appropriate to require the Commissioner to action retained refunds within these shorter time frames, then a viable option is to limit the circumstances in which refunds may be withheld.

Option C: Narrow the circumstances in which the Commissioner may retain the refund

Limit the Commissioner's power to withhold refunds to cases where he has reason to suspect fraud, evasion or a manifest clerical error. This is consistent with the view expressed by the Commissioner in *Multiflex* as to when he would exercise his power to withhold a refund.

Finally, we consider it entirely inappropriate that the second retention period carries on indefinitely. Taxpayers should not be required to commence Part IVC proceedings in order to compel the Commissioner to pay those refunds to which they are entitled in circumstances where he has failed to act expediently or at all. Further, it is unclear what the consequences will be for the taxpayer if it is

unsuccessful in those Part IVC proceedings. Does the Commissioner then have a mandate to retain the refund for an indefinite period? Does the Treasury propose that the taxpayer should be required to commence judicial review proceedings in order to require the refund to be paid? This contemplates that in order to pursue a single refund claim, a taxpayer may be required to commence Part IVC proceedings in respect of payment of the refund, judicial review proceedings in respect of payment of the refund and Part IVC proceedings in respect of the substantive entitlement if the Commissioner denies the refund by way of assessment or amended assessment. Moreover, a taxpayer would be required to fund all of this litigation while under the financial strain of not having received the refund(s) to which it claims to be entitled, potentially over a period of months or years. This method of administering refunds is obviously unacceptable and cannot, we hope, have been the intention of the Treasury.

It is imperative that a finite time period is inserted into s. 8AAZLGA(7) that requires the Commissioner to either release the refund (and exercise his wide audit, assessment and recovery powers if appropriate) or issue an amended assessment denying the taxpayer the refund, so that the taxpayer can, pursuant to Part IVC, determine its substantive entitlement. We submit that the total time between the Commissioner's initial decision to withhold the refund and the taxpayer's ability to determine its substantive entitlement under Part IVC should be no more than 60 days, plus the time taken by the taxpayer to respond to any information requests issued by the Commissioner.

A consent clause should also be inserted to allow a taxpayer to agree to an extension of time if appropriate.

4. Notification of Retention of Refund in Writing

Please clarify the wording of s. 8AAZLGA(3)(c), which refers to "the day mentioned in subsection (2)". There is no specific day mentioned in subsection (2) but rather the time period "before" the days specified in (2)(a) or (b). If the date referred to in subsection (3)(c) is intended to be the date the Commissioner notifies the taxpayer, please revise the drafting accordingly. Alternatively, please specify if the date referred to in (3)(c) is (2)(a) or (2)(b).

Subsections 8AAZLGA(2) and (6) should specify that when the Commissioner must inform the taxpayer that he has retained a refund, he must do so in writing. This is essential, particularly if our first interpretation of (3)(c) is correct and the 60 day time period commences from the date of notification.

5. ATO's Administrative Practice

We are concerned that taxpayers are being asked to rely on the ATO's administrative practices and internal performance benchmarks to mitigate the potential for the breadth and scope of the proposed statutory powers to be abused. In particular, at the Consultation, the Treasury representatives made much of the fact that prior to *Multiflex*, 97% of refunds are processed by the ATO within 14 days. While it may be that only 3% of refunds were withheld under the previous implied power, the Treasury is reminded that as tax agents and legal practitioners, we are often asked to represent clients who are seeking to deal with refunds that fall within that 3% retention rate, and that 3% is not an insignificant number in light of the vast number of refunds that the Commissioner is required to process. In any case, regardless of the percentage of refunds that have been affected or that are likely to be affected, administrative

practices should not be used to justify unnecessarily loose drafting of provisions that significantly encroach on taxpayers' rights.

Further, the retention rate is highly variable, with 6.3% of refunds being retained from more than 14 days in 2009/10. The statistics are likely to change even more significantly in circumstances where what was previously an "implied" power is now a broad statutory mandate. If indeed the Commissioner is confident that those benchmarks can be met going forward, it is entirely appropriate that they be reflected in the wording of the section and in limitation of the powers that are allowed to him. The experience of many taxpayers is that regardless of the Commissioner's policies and broader objectives, the nature of their interactions with the ATO depends on whichever taxation officer comes into receipt of their file, at which point the question of what the Commissioner *can do* under the law becomes significantly more relevant than what the Commissioner has indicated he will do in the course of Consultation on a provision or in a non-binding practice statement.

Consider, for example, cases in which refunds are withheld simply because they are inconsistent with the taxpayers' previously lodged activity statements. In this regard, please refer to Example 1.1 in the draft explanatory memorandum which relevantly states that "[g]iven that in preceding tax periods, Laura's net amount has always resulted in an amount payable to the Commissioner, the Commissioner forms the opinion that the information contained in Laura's GST return [a refund of \$50,000] requires verification." Under s. 8AAZLGA in its current form, the Commissioner will have the power to withhold that refund for 75 days without taking any action to investigate the claim or communicate the nature of his concerns to the taxpayer.

Regardless of whether the Treasury believes the Commissioner would act in such a way, or has been known to act in such a way, or in what percentage of cases he is likely to act in this way once the statutory power is enacted, we submit that it is a fundamentally flawed piece of legislation that would allow the Commissioner to do so, and so violate the rights of taxpayers to refunds to which they are otherwise legally entitled. The outcome will be that it will be nearly impossible for a taxpayer such as Laura in Example 1.1 to do anything to obtain her refund if the Commissioner chooses not to do anything for 75 days. That is an inordinate period of time when it is converted into 'payment terms', as most businesses rely on receiving payments between 14 and 30 days from the issue of invoices. Furthermore, the impact of the decision will be magnified where the Commissioner decides to withhold subsequent refunds, with refunds in a GST context typically arising on a monthly basis.

As also discussed at the Consultation, there are considerable concerns that the Commissioner's tax administration may also change for the worse, if he is given broad powers to withhold refunds without any requirements to do anything, other than notify the taxpayer that the amount has been withheld, in respect of which we incidentally note there is no redress if this time period is breached. Those concerns are that the Commissioner will essentially do what he is required to do, in the fullness of time. This is because the Commissioner is not accountable to the taxpayer for taking his time in dealing with a refund claim except to the extent that delayed refund interest is required to be paid by the Commissioner to the taxpayer. In our view, the payment of interest is not sufficient compensation for a taxpayer that is waiting for a refund of an amount to which they are entitled, nor is it a serious disincentive for the Commissioner where he is inefficient.

6. Explanatory Memorandum

We recommend the following changes to the Explanatory Memorandum.

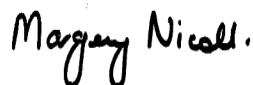
- a. In the table at page 2, under "Current law", delete the words "but the ability to retain a refund was considered to be implied by the law," as this is not a statement of the current law and simply states what was the Commissioner's view of the law. Instead, the decision of the Full Court in *Multiflex* should be inserted here.
- b. At paragraph 1.19, insert the explanation provided at the Consultation by the ATO representatives that the reference to "information" in s.8AAZLGA(8)(a) and (b) is to factual information and not to the views of the taxpayer as to the application of the taxation laws. This is important because the word "information" is very broad according to ordinary usage. It might also be helpful to add an example to the effect that the taxpayer and the Commissioner agree as to the facts of a particular transaction, however, the Commissioner disagrees with the taxpayer's view of how the tax laws apply to the facts. The example could further explain that, in these circumstances, the Commissioner may consider issuing an amended assessment, but cannot use s.8AAZLGA to withhold the payment of the refund that would otherwise be payable to the taxpayer based on the taxpayer's view of how the tax laws apply to that transaction.
- c. At paragraph 1.26, delete the words, "in the absence of one of the other factors such as the likelihood that the information was affected by fraud or evasion, intentional disregard or recklessness". This factor is not qualified in this way in the proposed legislation and none of the other factors are qualified in this way in the explanatory memorandum. Further, it is not correct to suggest that this factor would only apply in the absence of any other factors, as in the absence of any other factors the Commissioner would not, or should not, be inclined to retain the refund.

If you would like to discuss this matter, please contact me or the Tax Institute's Tax Counsel, Stephanie Caredes, on 02 8223 0011.

Yours sincerely



Ken Schurgott
President
The Tax Institute



Margery Nicholl
Acting Secretary –General
Law Council of Australia

Annexure A – Revised Exposure Draft

CC:

The Hon. Nicola Roxon MP, Attorney-General
Senator The Hon. Mark Arbib, Assistant Treasurer

Inserts for Refunds

EXPOSURE-DRAFT

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Schedule ?	The day this Act receives the Royal Assent.	

Schedule ?—Refunds

Taxation Administration Act 1953

1 After section 8AAZLG

Insert:

8AAZLGA Retaining refunds while Commissioner verifies information

Commissioner may retain an amount

- (1) The Commissioner may retain an amount that he or she otherwise would have to refund to an entity under section 8AAZLF, if:
- (a) the entity has given the Commissioner a notification that affects or may affect the amount that the Commissioner refunds to the entity; ~~and~~
 - (b) the Commissioner believes on reasonable grounds that information contained in the notification needs to be verified before the refund is paid to the entity; and
 - (~~bc~~) the Commissioner is satisfied that it would be reasonable to require verification of it is reasonable to retain the refund or part of the refund while the Commissioner investigates information that:
 - (i) is contained in the notification; and

(ii) relates to the amount that the Commissioner would have to refund.

(2) In deciding whether to retain the amount under subsection (1), the Commissioner must have regard to the following:

(a) the likelihood, on the basis of information available to the Commissioner, that the amount of the refund claimed by the entity is greater than correct amount payable to the entity;

(b) the likelihood that the information in the notification was affected by:

(i) fraud or evasion; or

(ii) intentional disregard of a taxation law; or

(iii) recklessness as to the operation of a taxation law;

(c) whether retaining the amount is necessary for the protection of the revenue, including the likelihood that the Commissioner could recover any of the amount if the information were found to be incorrect after the amount had been refunded;

(d) any complexity that would be involved in verifying the information;

(e) the impact of retaining the amount on the entity's financial position;

(f) any other matter the Commissioner considers relevant.

(23) The Commissioner must inform the entity in writing that he or she has retained the amount under subsection (1) and must provide the entity with written notice of the information required from the entity in order to verify the information in the notification. He or she must do so before:

(a) in a case to which paragraph 8AAZLF(1)(a) applies—the RBA interest day (within the meaning of section 12AF of the *Taxation (Interest on Overpayments and Early Payments) Act 1983*) for the RBA surplus of the entity; or

(b) in any other case—the 30th day after the entity gives to the Commissioner the notification mentioned in paragraph (1)(a) of this section.

(34) The Commissioner may retain the amount under subsection (1) until:

(a) the Commissioner becomes satisfied that it would no longer be reasonable to retain the refund; or

(b) there is a change to how much the Commissioner is required to refund, as a result of:

Formatted: paragraph,a

- (i) the Commissioner amending an assessment relating to the amount; or
 - (ii) the Commissioner making or amending an assessment, under Division 105 in Schedule 1, relating to the amount; or
 - (c) the ~~1460~~ day period starting on the day mentioned in subsection (~~23~~) of this section ends;
- whichever happens first.

(~~45~~) The period mentioned in paragraph (~~34~~)(c) (including the period as extended by a previous application of this subsection) is extended by the number of days during that period in relation to which the following paragraphs apply:

- (a) on or before the day, but during the period, the Commissioner requests information for the purposes of verifying the information mentioned in paragraph (1)(b);
- (b) the Commissioner does not receive the requested information before the day.

Commissioner may retain amount beyond ~~1460~~ days

(~~56~~) If paragraph (~~34~~)(c) applies, the Commissioner may retain the amount after the end of the period applicable under that paragraph, if the Commissioner is satisfied, on the basis of the information available to the Commissioner, that it would be reasonable to require verification (or further verification) of the information mentioned in paragraph (1)(b) it is likely that information contained in the notification is incorrect and that the incorrect information affects the amount of the refund payable to the entity.

(~~67~~) The Commissioner must inform the entity in writing that he or she has retained the amount under subsection (~~56~~). He or she must do so within ~~744~~ days after the end of the period.

(~~78~~) The Commissioner may retain the amount under subsection (~~65~~) until:

- (a) the Commissioner becomes satisfied that it would no longer be reasonable to retain the refund; or
- (b) there is a change to how much the Commissioner is required to refund, as a result of:
 - (i) the Commissioner amending an assessment relating to the amount; or

- 1 (ii) the Commissioner making or amending an assessment,
2 under Division 105 in Schedule 1, relating to the
3 amount; or
4 (c) 30 days after the end of the period referred to in paragraph
5 (4)(c);
6 whichever happens first.
- 7 (89) In deciding whether to retain the amount under subsection (65), the
8 Commissioner must have regard to the factors referred to in
9 subsection (2), the following:
- 10 (a) the likelihood that the information contained in the notification is
11 inaccurate, and the likely extent of that inaccuracy;
- 12 (b) the likelihood that the information was affected by:
- 13 (i) fraud or evasion; or
- 14 (ii) intentional disregard of a taxation law; or
- 15 (iii) recklessness as to the operation of a taxation law;
- 16 (c) whether retaining the amount is necessary for the protection of the
17 revenue, including the likelihood that the Commissioner could
18 recover any of the amount if the information were found to be
19 incorrect after the amount had been refunded;
- 20 (d) any complexity that would be involved in verifying the
21 information;
- 22 (e) the impact of retaining the amount on the entity's financial
23 position;
- 24 (f) any other matter the Commissioner considers relevant.
- 25 (10) As soon as the Commissioner becomes satisfied that any part of the
26 refund claimed by the entity is payable to the entity, the
27 Commissioner must pay that part of the refund to the entity.
- 28 (119) The entity may object to a decision of the Commissioner to retain
29 the amount under subsection (65) in the manner set out in
30 Part IVC, if the entity is dissatisfied with the decision.

31 Note: Interest on the amount may be payable under the *Taxation (Interest on*
32 *Overpayments and Early Payments) Act 1983.*

2 Before paragraph 14ZW(1)(ab)

33 Insert:
34

Formatted: paragraph,a

Formatted: subsection,ss

(aad) if the taxation objection is made under subsection 8AAZLGA(119) of this Act (the Commissioner has retained a refund while verifying information given to him or her)—the period starting on the earlier of:

- (i) the day the Commissioner informs the person under subsection 8AAZLGA(76) that the Commissioner has retained an amount under section 8AAZLGA; and
- (ii) the 147th day after the end of the period applicable under paragraph 8AAZLGA(43)(c);

and ending on the day (if any) on which the Commissioner refunds the amount, or makes a decision that results in the person becoming entitled to a refund of the amount; or

3 At the end of section 14ZW

Add:

(4) Without limiting paragraph (1)(aad), the following are taken for the purposes of that paragraph to be decisions that result in the person becoming entitled to a refund of the amount mentioned in that paragraph:

- (a) the Commissioner amending an assessment relating to the amount;
- (b) the Commissioner making or amending an assessment, under Division 105 in Schedule 1, relating to the amount.