



## THE TAX INSTITUTE

THE MARK OF EXPERTISE

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27 October 2014

Mr Tom Reid  
General Manager  
Law Design and Practice  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [TaxLawDesign@treasury.gov.au](mailto:TaxLawDesign@treasury.gov.au)

Dear Mr Reid,

### **Exposure Draft – Miscellaneous Tax Amendments**

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Exposure Draft - Tax and Superannuation Laws Amendment Bill: miscellaneous amendments (Exposure Draft)*.

Our submission refers only to Schedule 1 Part 2 of the Exposure Draft and addresses our main concerns with the proposed amendments to the *Taxation Administration Act 1953 (Cth) (TAA)* contained in that part of the Exposure Draft.

#### **1. Limiting the Commissioner's power to revoke or suspend endorsement**

In The Tax Institute's view, further consideration should be given to both the consequences and appropriateness of expanding the Commissioner's power to revoke deductible gift recipient (**DGR**) endorsement from a day earlier than the day on which the Commissioner decides to revoke DGR endorsement (per the proposed amendment to section 426-55(2) of the TAA in the Exposure Draft). Given:

- the disruptive effect of the loss of endorsement to both the organisation (which may be required to disgorge funds and, in some cases, be wound up) and donors (who may be denied deductions for donations made in good faith in earlier income years);
- the fact that the Commissioner is not required to provide any prior notice to the entity or give the entity an opportunity to respond before a decision is made (even if he does in practice); and

- the Commissioner's position on entities not being entitled to endorsement has not been upheld in a number of recent cases,

it is questionable whether the Commissioner's powers should be further expanded in this area. It is also questionable whether, in principle, the Commissioner should be able to retrospectively revoke endorsement for an organisation that has since rectified its behaviour, particularly if there is no materiality or culpability threshold or similar limitation on the Commissioner's powers. The Tax Institute therefore does not support the amendments.

Regardless of whether the amendments are to proceed, The Tax Institute considers that a time limit should be put in place to ensure the Commissioner cannot suspend or revoke an entity's DGR endorsement retrospectively more than 2 years before the decision is made.

The Tax Institute also suggests that Treasury consider introducing a materiality or culpability threshold which must be met before the Commissioner can retrospectively revoke or suspend endorsements. For instance, he may be entitled to do so where the entity has recklessly or intentionally disregarded the law, rather than, for example, where the entity has merely made errors in good faith or on reasonable grounds or in isolated or immaterial instances.

## **2. Protection for donors**

The Tax Institute requests that Treasury clarify the intended effect of the retrospective revocation or suspension of endorsement on donors who have previously made a donation to an entity. In particular:

- is it intended that donors would be denied a tax deduction for a donation made to an entity that had DGR endorsement at the time the donation was made but subsequently loses it? The Tax Institute suggests that donors should not be denied such deductions, particularly where they have acted in good faith and not been involved in the contravening conduct of the entity. In a revocation case, the revenue is protected by the gift funds being disgorged to another DGR under section 30-125 of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**) so the donor has ultimately effectively made a donation to an endorsed DGR. In any event, we request that the intended effect be made clear in the Bill and that Treasury include some guidance in the Explanatory Memorandum regarding what impact, if any, there will be on donors who have made tax deductible donations to entities who have their DGR status suspended or revoked.
- what is intended by giving the Commissioner a power to "suspend" endorsement? We presume it is intended to primarily be used to prevent tax-deductible donations from being made to an entity that has not complied with its requirements to maintain its DGR status while the entity takes steps to rectify

the non-compliance. However, it could still be applied both retrospectively and prospectively. In our view, suspension would not seem to trigger the requirements in section 30-125 to disgorge funds to another DGR entity as that section refers only to revocation (though the equivalent provisions in the constitutions of some DGRs may be enlivened by a suspension). Given this, if the endorsement were to be retrospectively suspended, we believe that it may only affect donors' entitlement to deductions rather than having any particular impact on the entity itself. We query whether this is an intended outcome. For the avoidance of doubt, however, we would not recommend that section 30-125 be triggered in the event of a suspension of endorsement.

### **3. Suggested amendment to section 426-55(3)**

The Exposure Draft contains two amendments to current section 426-55(3) so that it will read (proposed amendment in red text):

*(3) However, if the Commissioner revokes **or suspends** the endorsement because the entity is not entitled to it, the Commissioner must not specify a day **or a period starting** before the day on which the entity first ceased to be entitled.*

We suggest the following amendment instead to ensure the Commissioner is not able to revoke or suspend an entity's endorsement for a period in which they were otherwise entitled to be endorsed:

*(3) However,*

- a) if the Commissioner revokes the endorsement because the entity is not entitled to it, the earliest day the Commissioner can specify is the day after the last day the entity was entitled to be endorsed;*
- b) if the Commissioner suspends the endorsement because the entity was not entitled to it, the period the Commissioner can specify must not include a day on which the entity was entitled to be endorsed.*

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Flynn', followed by a long horizontal flourish line.

Michael Flynn  
President