THE TAX INSTITUTE

THE MARK OF EXPERTISE

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The Treasury
Langton Crescent
PARKES ACT 2600

By email: beps@treasury.gov.au

Dear Mr McKenna,

OECD Proposals for Mandatory Disclosure of Tax Information

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *OECD Proposals for Mandatory Disclosure of Tax Information* Discussion Paper (**Discussion Paper**).

Summary

Our submission below deals with each of the consultation questions in the Discussion Paper. Our main concerns are:

- the mandatory disclosure rules to be inserted into the Australian tax law should be targeted in their application;
- the rules should complement other disclosure regimes already included in the Australian tax law; and
- to the extent possible, duplication of disclosure should be avoided to ensure minimal compliance imposts arise from the inclusion of these rules.

Consultation Questions

Overview

Broadly, The Tax Institute is of the view that there is little need for a mandatory disclosure regime to be introduced into the Australian tax law given the plethora of disclosure rules already in the Australian tax law[1] and the existence of a strong 'promoter penalty' regime. However, as the Government intends to adopt mandatory

[1] These are listed at Part II of the Discussion Paper

disclosure rules, we note that a number of the Government's initial views captured in the Discussion Paper are better than what the OECD recommends. Having said that, we have a number of specific comments on the initial views put forward by the Government. Certain issues also require clarification.

1. *How new Mandatory Disclosure Rules should be framed in the context of Australia's current disclosure rules, and in particular, how they should be targeted towards specific taxpayer cohorts to preclude duplication with existing rules*.

The new mandatory disclosure rules proposed to be inserted into the Australian tax law should be very limited in their application and targeted specifically to persons who are required to make a disclosure to the Commissioner of Taxation (**Commissioner**) in relation to certain tax arrangements[2].

There are a number of policy objectives to be met by this new regime including giving the Australian Taxation Office (**ATO**) information as early as possible in relation to certain tax arrangements that are being designed and promoted by certain advisers and engaged in by certain taxpayers. Another objective of the new rules is to deter advisers and taxpayers from engaging in these types of arrangements in the first place as well as avoiding unnecessary compliance burdens on taxpayers.

There are already a number of mechanisms through which information about aggressive tax arrangements and schemes is disclosed to the Commissioner[3]. Unlike the broad administrative powers the Commissioner has to require the disclosure of information, in the case of the proposed mandatory disclosure rules, the Commissioner can require disclosure to be made without knowing who needs to make the disclosure.

Introduction of another disclosure regime will give rise to additional compliance costs to those who are already required to make disclosures. As such, in designing the mandatory disclosure rules, Treasury should take account of other disclosure regimes already in existence and reduce duplication of disclosure as much as possible.

In this regard, the legislation should be very clear on its face that the mandatory disclosure rules would only be triggered in relation to defined tax arrangements with specific features and the rules are targeted at advisers who are actively involved in these tax arrangements (see further below).

In providing our comments, we are mindful of two regimes which already exist within the Australian tax law. Firstly, there are the general anti-avoidance provisions in the tax law which apply to taxpayers. Secondly, the 'promoter penalty' regime that has been in place in the Australian tax law for the last ten years targets promoters (ie 'advisers') of tax avoidance and evasion schemes. In this regard, to a large extent there are already rules in place to capture and penalise activity by taxpayers and advisers that results in

[2] The arrangements concerned should contain certain features discussed later.

[3] See Part II of the Discussion Paper

non-compliance with tax laws, particularly in relation to aggressive tax planning schemes. The mandatory disclosure rules adopted into the Australian tax system would therefore need to complement the 'promoter penalty' and other disclosure regimes already in the system.

2. *The Government's preliminary position that Mandatory Disclosure Rules should apply to tax advisers who are involved in the design, distribution and management of aggressive tax arrangements (Issue 1 in Table 2).*

Who should the mandatory disclosure rules apply to?

The Government's initial view is that the mandatory disclosure rules should apply primarily to tax advisers involved in the 'design, distribution and management of aggressive tax arrangements'. The Government is also of the view that where the relevant tax adviser is offshore, the Commissioner may instead require the taxpayer to make the disclosure.

The OECD has suggested the rules could be imposed on either the tax adviser or taxpayer, or both[4].

Consistent with our view that the application of the mandatory disclosure rules be narrow and targeted, we consider that adopting the Government's view of having the primary obligation fall on advisers would ensure the most practical application of the mandatory disclosure rules.

Taxpayers will be caught 'in the net' of the mandatory disclosure rules where they have participated in arrangements that become the subject of mandatory disclosure. However, as taxpayers already have a general obligation to disclose information about arrangements and transactions that give rise to tax implications for them, it is not necessary that a separate obligation to disclose be imposed on taxpayers under these rules.

Meaning of 'design, distribution and management of aggressive tax arrangements'

The Tax Institute queries what is intended to be meant by the expression 'design, distribution and management of aggressive tax arrangements'.

i) Design, distribution and management

What does Treasury intend the 'design, distribution and management' aspect to mean? Would a person required to disclose under the mandatory disclosure rules need to be doing more than just providing advice on tax planning?

[4] See the *OECD/G20 Base Erosion and profit Shifting Project – Mandatory Disclosure Rules – Action 12: 2015 Final Report* (**Action 12 Report**)

In our view, 'design, distribution and management' should constitute the development and active promotion and management of the arrangement rather than just providing favourable advice on an arrangement[5]. That is, doing more than just providing advice on tax planning. For ease of drafting, Treasury could adopt the definition of 'promoter' contained in section 290-60 of the TAA.

Therefore, the rules should only apply to advisers who do more than just provide advice on certain defined tax arrangements. In this regard, there should be an exclusion for merely giving advice consistent with the exclusion that applies to advisers in the 'promoter penalty' regime. This will distinguish these advisers from an adviser who is actively promoting an aggressive tax arrangement and should fall under the rules.

ii) Aggressive tax arrangements

What sort of arrangement does Treasury envisage would constitute an 'aggressive tax arrangement'? Does Treasury envisage activity that is the same or different to, say, a 'tax exploitation scheme' in the 'promoter penalty' rules? Would the arrangements be broader? It would be useful if Treasury could clarify the types of tax arrangements they envisage would be subject to these rules.

The term 'aggressive tax arrangement' should be defined in the legislation for the purpose of these rules. In our view, a good starting point to define an 'aggressive tax arrangement' would be to start with the definition for 'aggressive tax planning' in *Practice Statement Law Administration PSLA 2008/15: Taxpayer Alerts* (**PSLA 2008/15**) which is:

> …tax planning that goes beyond the policy intent of the law and involves deliberate approaches to avoid any type of tax, superannuation obligation or excise duty. It undermines the integrity of the revenue system and community confidence in the fairness and equity of that system[6].

Treasury should also consider including the common features of arrangements that have met the definition of a 'tax exploitation scheme[7]' for the purpose of the promoter penalty rules[8].

3. *The Government's preliminary position that broad discretion should be provided to the ATO in determining 'aggressive tax arrangements' that would trigger Mandatory Disclosure Rules. In particular, input is sought on how to design*

[5] This is similar to the 'promoter penalty' rules where advisers who give favourable advice on a scheme that might later be found to be a 'tax exploitation scheme' are excluded from the application of those rules. Refer to Div 290 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**) and paragraphs 3.49 and 3.50 *of the Explanatory Memorandum to Tax Laws Amendment (2006 Measures No. 1) Act 2006*.
[6] Paragraph 4 of PSLA 2008/15
[7] As defined in section 290-65 of the TAA
[8] Alternatively, these common features could comprise some of the 'hallmarks' of an aggressive tax arrangement.

legislative guidelines on how this discretion should be exercised (Issue 2 in Table 2).

The guidelines should require the Commissioner to have substantive evidence of the tax arrangements that he intends to be disclosed pursuant to the mandatory disclosure rules before he can exercise his discretion and make a publication requesting disclosure. To compare, this is a higher threshold than that which applies for a Taxpayer Alert where the Commissioner may base a Taxpayer Alert on 'intelligence' received about aggressive tax planning occurring in the market place[9].

In addition, the Commissioner should be required to clearly articulate the arrangement he has determined is an 'aggressive tax arrangement'. This will then allow advisers to determine with ease and certainty whether they are involved in such arrangements and therefore whether they have an obligation to make a disclosure to the Commissioner.

4. *The OECD Final Report's distinction between general and specific hallmarks in relation to aggressive tax arrangements that should trigger the Mandatory Disclosure Rules. In particular, views are sought on the advantages and disadvantages of general hallmarks as triggers for Mandatory Disclosure Rules (Issue 2 in Table 2).*

Should a 'hallmark' approach be adopted?

The Tax Institute is of the view that if a 'hallmark' approach is adopted, as is recommended by the OECD[10], care will need to be taken regarding what generic and specific 'hallmarks' are adopted.

We note the ATO already adopts a 'hallmark' approach in relation to how aggressive tax planning arrangements that are included in Taxpayer Alerts are identified so taking a hallmark approach is familiar to the ATO and taxpayers[11] and is a recommended approach.

The types of 'hallmarks' to be included could be drawn from the list in paragraph 27 of PSLA 2008/15 and could include elements such as:

- Whether the tax arrangement is 'aggressive'; and
- Whether the tax outcome is a significant factor in the design, distribution and management of the arrangement to taxpayers;

and could also include features commonly found in a 'tax exploitation scheme'.

5. *The Government's preliminary position that there should be clear legislative guidelines on the type of information that should be required to be disclosed*

[9] Paragraph 3 PSLA 2008/15
[10] Action 12 Report
[11] Since it is a part of the Taxpayer Alert process

under the Mandatory Disclosure Rules. In particular, views are sought on how these legislative guidelines should be designed (Issue 3 in Table 2).

We agree there should be clear legislative guidelines on the type of information required to be disclosed about a tax arrangement the Commissioner considers falls under the mandatory disclosure rules. The information to be provided should include[12]:

- the name and contact details of the adviser(s) who has been marketing the scheme;
- contact details for taxpayers who have participated in the scheme; and
- a reference to the relevant arrangement for which the Commissioner has required disclosure (eg a publication number).

We suggest that the tax arrangements that will trigger the application of the mandatory disclosure rules should be published by the Commissioner in a product similar to a Taxpayer Alert. The product name and number will provide a useful reference to persons required to make a disclosure.

6. *The Government's preliminary position that information should not be required earlier than 90 days of the publication of the ATO's statement. Views are also sought on the proposed mechanism for tax advisers seeking the ATO's approval for extending the timeframe for making a disclosure (Issue 4 in table 2).*

The Discussion Paper suggests that persons required to disclose under the mandatory disclosure rules should not be required to make any disclosure earlier than 90 days after the Commissioner publishes that a scheme or arrangement is reportable. However, it is suggested the Commissioner have discretion to determine when he requires disclosure be made.

In our view, disclosure should not be required to be made earlier than 90 days after publication of the arrangement being reportable.

We support the view there should also be the capability for a person required to disclose under these rules to apply to the Commissioner for an extension of time to make the disclosure in appropriate circumstances.

7. *The Government's preliminary proposal on what should happen after tax advisers comply with the Mandatory Disclosure Rules (Issue 5 in table 2).*

The preliminary proposal in the Discussion Paper will require an adviser to advise a taxpayer involved in the arrangement the reference number assigned to the arrangement by the ATO. In the alternative, where the Commissioner makes a publication about an arrangement in a specific document, the document reference number instead could serve as the reference the taxpayer should use.

[12] This is a non-exhaustive list.

Penalties that could apply can be drawn from penalty regimes already in the tax law.

In our view, after a disclosure has been made, the following should occur:

a) Adviser – where the aggressive tax arrangement amounts to a 'tax exploitation scheme', the penalties applying to the adviser should be in line with the promoter penalties regime. However, account should be taken of the fact the adviser has made a disclosure under the mandatory disclosure rules. For example, the civil penalties in the promoter penalties regime should be modified to allow the Federal Court to take into account the disclosure under the mandatory disclosure regime[13].

   A separate penalty regime for the design, distribution and management of an 'aggressive tax arrangement' that is not a 'tax exploitation scheme' will need to be included in the law (see below), factoring in an appropriate reduction in penalties for disclosure.

b) Taxpayer – the penalty that would otherwise apply to them should be reduced in accordance with section 284-225 of Schedule 1 to the TAA on the basis that in effect there will have been a 'voluntary disclosure' made for the taxpayer about information the Commissioner may not have discovered/uncovered until a later stage (eg audit).

8. The Government's preliminary proposal on what should happen if tax advisers do not comply with the Mandatory Disclosure Rules (Issue 6 in Table 2).

In our view, where an adviser has not made a disclosure and the aggressive tax arrangement amounts to a 'tax exploitation scheme', the penalties under the promoter penalties regime should apply. A separate penalty regime for non-disclosure in relation to the design, distribution and management of an 'aggressive tax arrangement' that is not a 'tax exploitation scheme' will also need to be included in the law.

No separate penalty should apply to taxpayers under the mandatory disclosure rules. Rather, the ordinary (unadjusted) penalties should instead apply.

9. The Government's preliminary position regarding review mechanisms following the disclosure of information under the Mandatory Disclosure Rules (Issue 7 in Table 2). What review mechanisms, if any, would be appropriate?

The Tax Institute is of the view that there should be a review mechanism similar to Part IVC of the *Income Tax Assessment Act 1936* (Cth) for the following aspects:

[13] For example, a new sub-section could be inserted into section 290-50(5) to the effect of 'whether the entity has made a disclosure to the Commissioner pursuant to [insert reference to relevant legislation containing the mandatory disclosure rules]'.

a) Whether the arrangement falls within the tax arrangement defined by the Commissioner as falling under the mandatory disclosure regime;
b) If so, was the adviser a 'promoter' and not merely an adviser?

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

Arthur Athanasiou
President