THE TAX INSTITUTE

31 August 2018

Ms Mirren Allica
Black Economy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: blackeconomy@treasury.gov.au

Dear Ms Allica,

Designing a Modern Australian Business Number System

The Tax Institute welcomes the opportunity to make a submission to Treasury in relation to the *Designing a Modern Australian Business Number System* Consultation Paper (**Consultation Paper**). A review of the Australian Business Number (**ABN**) system is supported. The use of an ABN has evolved considerably since its role as a core element of the introduction of the GST almost 20 years ago with the evolution of the economy and the increasing flexibility of the workforce.

Summary

Our submission below addresses our main concerns in relation to the Consultation Paper. We note some general comments on certain aspects of the proposal to modernise the ABN system and a recommendation for the definition of "carrying on an enterprise" be the same for both the application for an ABN and applying for GST registration.

Discussion

1. General Comments

i) Reviewing eligibility for an ABN

The Tax Institute considers that there should be a more stringent review that is undertaken at the time an entity applies for an ABN. Reviews undertaken by the Registrar as highlighted in the Consultation Paper have shown that significant numbers of ABNs have been issued where the applicant was not entitled to receive one. Additional review at the time of application, coupled with more stringent rules for entitlement, should help identify potential phoenix participants or high-risk applicants or

should increase the likelihood of identifying applicants who do not genuinely require an ABN and others who may already be known to engage in high risk or other phoenix activities.

In addition, assessment of ongoing eligibility for ABN holders would ensure that entities who legitimately require an ABN maintain their ABN and those who do not legitimately require an ABN or whose circumstances simply change such that they no longer meet the eligibility requirements cannot continue to hold their ABN. The effectiveness of this will depend on the criteria adopted that determines eligibility for an ABN in the first instance.

ii) Associate all relevant 'names' with the ABN on the register

It is proposed that data from the Australian Business Register (**ABR**) and the ASIC register will be brought together on the one platform. Combining this information should ensure that the variety of names a business may operate under, for example the registered name of the entity and its trading name, can all be associated with that entity's ABN. This should assist somewhat in reducing the ability of an ABN to be used fraudulently in association with a business or trading name purportedly associated with the ABN. Where all relevant names are publicly recorded against the ABN, this will provide an easy way to verify an ABN against a trading name and therefore less opportunity for fraudulent use of ABNs.

iii) Introduction of a renewal fee

It seems that part of the intention behind introducing a renewal fee is to "discourage people from holding an ABN when they do not need one or are not entitled to one[1]". A renewal process is essential to ensure that ABN information is up to date and holders still qualify to have one. To the extent possible, the renewal should align with other processes and a period of, say, 3 years would appear to be appropriate so as not to create too much of a burden on businesses and to ensure the integrity of the ABN system. The funds raised could be used to ensure ABN holders meet their compliance obligations and to ensure those that do not are removed from the system.

In the Institute's view, the presence of a renewal fee is unlikely to deter participants in the Black Economy who obtain ABNs for illegitimate purpose from applying for ABNs on its own. Introducing a renewal fee together with other proposed deterrent factors, might have some impact in this regard instead.

2. Other matters - Aligning the ABN "carrying on an enterprise in Australia test" with the eligibility for GST registration test.

For convenience, we refer to the indirect tax zone as Australia.

[1] See p10 of the Consultation Paper

We recommend including a definition of "carrying on an enterprise in Australia" into the *A New Tax System (Australian Business Number) Act 1999* (Cth) (**ABN Act**) and into section 12-190 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA)** (via section 995-1 of the *Income Tax Assessment Act 1999* (Cth) (**1997 Act**)) that aligns with the corresponding definition in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**).

The ABN Act previously contained a definition of "carrying on an enterprise" in Australia that aligned with the definition in the GST Act (former section 39 of the ABN Act). This was subsequently amended so that the definition instead aligned with the GST Act through section 12-190(4)(a) of Schedule 1 to the TAA and the definition of "carried on in Australia" in section 995-1 of the 1997 Act.

This definition in the 1997 Act was removed in the *Taxation Laws Amendment Act (No. 4) 2003* (Cth) for a number of reasons[2]. These reasons are no longer relevant as explained below.

Subsequently, the GST cross border rules were amended by the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (Cth) (**2016 Measures No.1 Act**).

One significant aspect of these amendments is the inclusion of a new test for when businesses carry on an enterprise in Australia (new section 9-27 of the GST Act).

Briefly, the new test requires that specified individuals carry on an enterprise in Australia either through a fixed place or through one or more places for more than 183 days in a 12 month period.

There is significant history associated with these changes, which is summarised in the Explanatory Memorandum to the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016* (Cth)[3].

Essentially, the amendments sought to limit the number of non-residents in the GST system by reducing

> the circumstances in which a non-resident supplier is drawn into the GST system to ensure that the GST system does not unnecessarily impact on non-resident suppliers dealing with Australian enterprises[4].

[2] Refer to paragraphs 6.2, 6.3 and 6.8 in the Explanatory Memorandum to the *Taxation Laws Amendment Bill (No. 4) 2003* (Cth)

[3] See paragraph 2.16 of the Explanatory Memorandum to the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016* (Cth)

Accordingly, there are two reasons for aligning the definition of "carrying on an enterprise" in Australia in section 9-27 of the GST Act with the ABN Act and section 12-190 of Schedule 1 to the TAA.

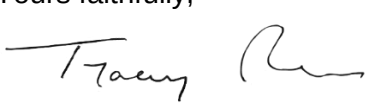
Firstly, the concern highlighted in the Explanatory Memorandum to the *Taxation Laws Amendment Bill (No. 4) 2003* (Cth) no longer applies. The definition of "carrying on an enterprise" in section 9-27 of the GST Act no longer references the "permanent establishment" definition in the 1997 Act (and the concept of business therein). Where the definition of "carrying on an enterprise" in Australia in section 9-27 of the GST Act was aligned with section 12-190 of Schedule 1 to the TAA, section 12-190 would apply to non-business enterprises, such as governments and non-profit organisations, since the GST rules apply to such enterprises.

Secondly, the GST and ABN systems are very closely aligned. The significant compliance costs associated with non-residents being required to register for GST in Australia equally apply to non-residents that need to apply for an ABN so that tax is not required to be withheld from payments made to non-residents.

Further, since the definition of "carrying on an enterprise" now assumes its ordinary meaning, many non-residents with a limited presence in Australia fall within the ordinary meaning of this concept. In our experience, this has created significant uncertainty over when a non-resident needs to obtain an ABN (even if it does not need to register for GST). Most non-residents currently fall outside of the application of section 12-190 only because of the operation of sections 12-1(1) and (1A) of Schedule 1 to the TAA. Our understanding is that the GST rules were deliberately redesigned to keep non-residents out of the GST system unless they had a significant presence in Australia. Aligning the ABN and GST rules in relation to the definition of "carrying on an enterprise" would create certainty as to when a non-resident required an ABN for the purpose of section 12-190 and also make sure that a non-resident only needs an ABN where it is also required to register for GST.

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

Yours faithfully,



Tracey Rens
President

[4] See paragraph 2.11 of the Explanatory Memorandum to the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016* (Cth)