

21 August 2019

By email only: businestaxdebts@treasury.gov.au

Submission to Treasury: *Disclosure of Business Tax Debts*

This submission is made on behalf of the Australian Credit Forum (**ACF**).

The ACF was established in the early 1970's by a group of senior credit professionals. The group recognised the need to develop an association where members could meet on a regular basis to exchange thoughts and ideas to strengthen their own knowledge but also the standards of the industry.

The association meets on a regular basis to discuss and review existing and proposed changes to the Federal and State Governments legislation that might have an impact on their company's credit policies and practices in their day to day role as credit professionals.

The members of ACF are drawn from all areas of the credit profession across a range industry groups including by not limited to senior credit managers, members of the legal profession, insolvency practitioners, credit insurance underwriters and brokers, mercantile agents and credit reporting agencies. The depth and diversity in experience of the members ensures that a broad cross section of the credit industry considers the impact of all relevant legislation.

Tax Debt Information Disclosure

The *Taxation Administration (Tax Debt Information Disclosure) Declaration 2019 (Draft)* sets out a class of entities whose tax debt information can be disclosed to credit reporting bureaus (**CRB**).

It is proposed that the Australian Tax Office (**ATO**) will disclose tax debt information of businesses who do not pay tax debts to CRB's when total debts exceed \$100,000 for more than 90 days and who fail to effectively engage with the Commissioner.

This disclosure will give providers of credit greater insight into the financial constitution of prospective customers. This should reduce and mitigate risk to creditors and, by extension, the flowing impacts of insolvency. It will also increase incentive for businesses to pay their tax on time to avoid appearing a riskier prospect to creditors than their tax-paying competitors.

It is clear the Government have policy objectives to "reduce unfair advantage obtained by businesses that do not pay their tax on time" and "encourage businesses to engage with [the ATO] to manage their tax debts".¹ With specific modification, the ACF consider the draft will facilitate these objectives.

¹ Transparency of tax debt measure, Australian Taxation Office, 19 December 2018.

The ACF have reviewed the relevant documents and welcome the opportunity to make a submission to the Government's consultation on the draft, to ensure the effectiveness of the provisions and fulfilment of the legislative intent.

Scope

While this initiative will assist credit providers in obtaining a greater understanding of the businesses in which they are trading with, the ACF has some concerns around:

1. the scope of the disclosure of the "*Tax debts that are not to be included in total tax debts*" as identified at 6(2) of the draft (**Subsection 2**);
2. the dollar value of the total of debts required before disclosure can occur.

Tax debts that are not to be included in total tax debts

As presently drafted Subsection 2 merely provides examples of business tax debt that will not contribute towards the \$100,000 threshold. Further page 3 of the Explanatory Statement (**ES**) provides an example where "[a]n entity that no longer falls within the class of entities declared in the Draft may have information disclosed to allow taxation officers to instruct credit reporting bureaus to remove the tax debt information of such an entity".

It is clearly envisaged that entities who take steps to move all or part of their tax debt into a category listed in subsection 2 can have their information removed from credit reporting bureau (**CRB**) records retrospectively.

The ACF consider the Draft will fail to achieve the above policy objectives by reason of the following issues that are likely to arise.

Payment arrangements

1. Affected businesses need only negotiate a payment arrangement in respect of their tax debt which exceeds the threshold, and their tax debt information can be removed from CRB records.
2. The taxpayer may not be deterred from avoiding tax obligations given the real possibility of quickly returning to equal footing with tax-paying competitors once a payment arrangement is negotiated.
3. The taxpayer may also pay the ATO in preference to other creditors when they need to clear their record once it reaches the threshold, knowing the record with the CRB will then be removed.
4. The mere removal of the debt from CRB records is contrary to industry practice. The usual practice is to have the record marked with either settled or paid. It is not usually removed unless there is a mistake.

5. Information regarding all stages of payment including, settlement, payment arrangement and dispute are vital for credit professionals to make decisions on the provision of credit. Credit professional's rely on this information when assessing the viability of a business and when to supply credit.
6. Prior defaults can be strong indicators of future issues. Generally, credit industry practice is to retain information for a historic period, and merely update it on settlement, payment arrangement or dispute. Allowing businesses to quickly remove such information increases the likelihood of financially distressed or high risk businesses obtaining credit.
7. Any transparency created by disclosure in the first place will be undermined by its prompt removal, and unfair advantages enjoyed by tax-avoiding business will likely remain undisturbed.
8. Argument may be made that providing strong incentive for businesses to negotiate payment arrangements with the ATO achieves the tax debt management policy objective. However, it should be considered whether the bulk of arrangements entered following this legislation will be genuine, or simply time-buying mechanisms for financially distressed or dishonest businesses, and illegal phoenix operators.
9. Once a business enters a payment arrangement, clears their record and obtains credit, they may simply default on the arrangement and continue to benefit from the credit. It should also be noted that any incentive provided does not entice early engagement with the ATO, but engagement when it suits the business: i.e. when applying for credit. This will not achieve the tax debt management policy objective.

Objections and appeals

10. The accuracy of information available to creditors may fluctuate as business tax debts are disclosed and subsequently removed from public record. Information regarding tax debts, cash flow issues, payment arrangement obligations and disputes is highly relevant to the decision making process of credit providers.
11. The failure to register the tax debt with a CRB because the taxpayer has lodged an objection which has not been withdrawn or the commissioner has not made a decision on, or an application has been made to Australian Appeals Tribunal or appealed to the Federal Court, or if a request has been made for a reconsideration of reviewable decision should also be properly considered. The failure to list any sort of record of the tax debt in these circumstances could be detrimental to the credit provider in the event that the outcome is not in favour of the taxpayer or such an objection or appeal has been lodged to avoid payment of the tax debt or if the taxpayer is experiencing cash flow issues.
12. While a debt is under review, details of the tax debt should be listed with further annotation noting the debt is currently under review. This practice is not different to the usual practice of recording court proceedings when on foot but not yet finalised or a determination made.

13. The failure to include at the very least some sort of notation with a CRB of the taxable debt for various circumstances identified in section 6(2) (b) to (f) is problematic and creates an unfair advantage.
14. The failure to list the tax debt in these circumstances with a CRB could be seen as strategic loophole, by recalcitrant debtors. Without this information as credit provider will continue to supply to an entity which may have no ability to repay the credit provided.

The total value of the debt - \$100,000

15. In the event that the entity criteria is met, the tax debt must be at least \$100,000, and overdue for more than 90 days.
16. While it is commended that the entities debt includes income tax debts, activity statement debt i.e GST, Pay As You Go Withholding, superannuation debts, fringe benefits tax debts, penalties and interest charges, and the threshold of \$100,000 is a safeguard for businesses who make efforts to pay their tax on time, there is a significant number of businesses that would not accrue a tax debt of quite this size for 90 days. This undermines any levelling of the playing field for small to medium enterprises (**SME**).
17. In ACF's experience credit professional's usually rely strongly on information obtained from CRB's regarding smaller to medium size businesses when making decisions as to whether to supply credit.
18. Consideration should be given to whether the threshold should be reduced to be in line with reporting practices with CRB's more broadly so that credit providers are able to obtain a full picture of the financial history and capacity to pay before the credit is supplied.
19. Tax debts of \$100,000 will likely be insurmountable for many small businesses. The benefit of engaging with the ATO to manage their debt would be lost by this point. Moreover, the threshold suggests that the commissioner will only treat high quantum tax debts seriously.
20. A substantially lower threshold (i.e. somewhere in the order of \$10,000) would encourage better practice, and keep credit providers fully informed. This does not necessary mean less business will receive credit; credit providers will be able to weigh the tax default accordingly and provide only credit that the business can afford.

Recommendations and conclusion

The ACF genuinely commends the Government for this important initiative to disclose tax debt information to CRB's. However, as outlined above, the capacity of the ATO to instruct CRB's to remove that information once a business no longer meets the criteria or the tax debt is one that is identified in Subsection 2, is problematic and requires further consideration for a number of reasons.

To best achieve the Government's policy objectives, it is recommended that:

- A new provision be inserted into the draft which expressly provides a minimum period that business tax debt information must be kept by CRB's, regardless of whether the affected business still meets the criteria;
- The minimum period should be in line with industry practice which commentary suggests is five years.
- The Commissioner should only have right to instruct CRB's to remove business tax debt information where it was originally listed in error and approached in line with industry practice;
- The Commissioner should update a CRB when the debt is paid (in full or by way of settlement), an arrangement is entered, expunged (by Court, Tribunal or ATO), or formally disputed according to law.
- The threshold to meet the criteria is high, and is safeguard enough for businesses that make genuine efforts to pay their tax on time. The majority of businesses doing so would simply not accrue an undisputed tax debt of \$100,000 for more than 90 days. On that basis, the above recommendations would not operate harshly, and would ensure the Draft effectively achieves its legislative intent.
- The threshold be reduced to something significantly lower from \$100,000 to \$10,000 to encourage better business practice and to keep credit providers fully informed.

Endorsement

When preparing these submissions the ACF has had the benefit of reviewing the joint submissions prepared by the Australian Finance Industry Association, the Australian Institute of Credit Management, the Australian Retail Credit Association, and the Australian Restructuring Insolvency and Turnaround Association (**Industry Bodies**) dated 21 August 2019. The ACF endorses the Industry Bodies submissions.



David Hunt
Chairman
THE AUSTRALIAN CREDIT FORUM