



Law Council  
OF AUSTRALIA

*Business Law Section*

# Improving how the ATO deals with vulnerable taxpayers

Australian Taxation Office

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# About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The purpose of the Business Law Section is to be an objective and independent national body comprised of experts who actively contribute to the effective development, implementation and administration of business law in Australia in accordance with its guiding principles of promoting and defending the rule of law, and promoting effective development and administration of business law.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

Currently the Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee

- SME Business Law Committee
- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

As different or newer areas of business law develop, the Business Law Section evolves to meet the needs or objectives of its members in emerging areas by establishing new working groups or committees, depending on how it may better achieve its objectives.

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committee meet quarterly to set objectives, policy and priorities for the Section.

Current members of the Executive are:

- Mr Philip Argy, Chairman
- Professor Pamela Hanrahan, Deputy Chair
- Mr Adrian Varrasso, Treasurer
- Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Caroline Coops
- Dr Elizabeth Boros
- Shannon Finch
- Clint Harding
- Peter Leech

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

## For Further Information

The Taxation Law Committee and SME Business Law Committee (the **Committees**) of the Business Law Section (**BLS**) of the Law Council of Australia welcome the opportunity to provide this submission to the Australian Taxation Office's (**ATO**) consultation on understanding approaches to working with vulnerable clients to identify opportunities to improve the client experience (**ATO consultation**).

The information available on the ATO's website indicated that the "work is underway to explore the definition of and approach to vulnerability. Recent events such as the 2019-20 bushfires and the COVID-19 pandemic have drawn focus to the ATO's need for an empathetic approach to clients experiencing vulnerability".

The Section would be pleased to discuss any aspect of this submission.

Any queries can be directed to the Member of the Committees, Bruce Collins, at [bruce@taxcontroversypartners.com.au](mailto:bruce@taxcontroversypartners.com.au) or on 0409 440 415.

With compliments

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

**Philip Argy**  
**Chairman**

**Business Law Section**

## Executive Summary

To improve the client experience and to promote better access to justice for vulnerable taxpayers, the Committees have relied on practical experience of BLS members that indicates that there are areas where ATO staff could better recognise and respond to the vulnerability of certain taxpayers, especially those with serious mental and/or physical health issues and resulting financial crises.

Recognising that the ATO appears to have good processes to recognise and respond to short-term external vulnerability for taxpayers affected by natural disasters (droughts, bushfires or floods), to improve more individually vulnerable taxpayers' client experiences and their access to justice, the Committees recommend further improvements in:

1. how the ATO recognises the vulnerable status of individual taxpayers suffering from serious mental and/or physical health issues and resulting financial crises;
2. standardising the types of evidence about such individual vulnerability that the ATO will accept to recognise that status and support their decisions in responding to vulnerable taxpayers;
3. ATO culture and business practices to better respond to vulnerable taxpayers suffering from serious mental and/or physical health issues and resulting financial crises; and
4. public communication of those business practices and relevant channels for vulnerable people to have their vulnerable circumstances recognised and responded to by the ATO.

In support of the recommendations, this submission also includes:

- general observations and anonymised summaries of confidential case studies provided by BLS members as illustrations of these issues and the arguments for further improvement (**Attachment A**);
- a review of existing ATO website content on vulnerable taxpayers (**Attachment B**);
- a review of relevant legislative contexts for the ATO (**Attachment C**);
- a review of relevant ATO policy & guidance touching on vulnerable taxpayers' personal circumstances (**Attachment D**); and
- a brief outline of relevant academic and social research on serious physical and/or mental health issues (**Attachment E**).

# Submission

## 1. Issues identified through practical experience of BLS members

In preparing this submission, various BLS members have shared with the Committees their practical experiences with ATO responses when engaging with the ATO on behalf of vulnerable taxpayers (as outlined in **Attachment A**), especially those with serious physical and/or mental health issues, along with accompanying financial crises. While these experiences were 'mixed', common themes identified by BLS members are that the ATO staff:

- a) Often did not seem to know what to do when initially presented with independently diagnosed physical or mental health evidence regarding taxpayer circumstances – both at the case officer level or even for their more-senior policy advisors;
- b) Were inconsistent in assessing evidence of serious physical and/or mental health diagnoses – ranging from refusal to consider the issue at all, through confusion about what evidence should be solicited from the vulnerable client and how to assess such evidence when provided, even to actively questioning the opinions of highly qualified medical and psychological experts;
- c) Did not seem to have clearly articulated guidance on what were the range of appropriate options for how they could and should respond to address serious physical and/or mental health impacts on compliance obligations for affected taxpayers who have provided such evidence; and
- d) Continued what BLS members have viewed as inappropriate action adversely affecting such taxpayers where such strong evidence of serious mental physical and/or health conditions has been provided to case officers and even escalated to their more senior leaders.

The examples provided are limited to those where the vulnerable taxpayers have had legal representation in their dealings with the ATO. It may be that a number of vulnerable taxpayers have not had this advantage, due to factors associated with their conditions/circumstances, e.g. a reduced capacity to deal with stressful situations and/or cost constraints.

## 2. Desired future outcome of this consultations based on BLS members experience

In preparing this submission, BLS members have suggested four key outcomes that they hope to see implemented which could vastly improve vulnerable clients' access to justice and their client experience with the ATO for vulnerable taxpayers and their representatives:

- Changing ATO culture and decision-making processes to more effectively recognise wider forms of vulnerability in making ATO decisions when responding to vulnerable taxpayers' circumstances,
- Clearly articulating the range of types of evidence that vulnerable taxpayers and their practitioners may seek to provide to the ATO to have that vulnerability recognised,
- Updating ATO internal guidance to, and education of, ATO client-facing staff and their leaders about how to better recognise and respond to vulnerable taxpayers' circumstances, and
- Updating ATO website content and related communications for vulnerable taxpayers and supporting practitioners about how affected vulnerable taxpayers' circumstances

will be recognised by the ATO in making decisions responding to that vulnerable taxpayer's tax and superannuation compliance obligations.

### **3. Impacts of vulnerability on Taxation Obligation Contexts and *vice versa***

In a range of situations, a taxpayer's personal circumstances may leave them vulnerable and inhibit their ability to meet their taxation and superannuation obligations. From member feedback, these personal circumstances creating vulnerability may include:

- a) natural disasters (such as bushfires, floods, on-going drought, etc) that are not uncommon in Australia (and for which the ATO has fairly well-developed processes to provide short-term support),
- b) collective health and economic threats, such as the global COVID-19 pandemic – impacting a significant part of the population (where the ATO contributed significantly in both administrative terms and in supporting governmental legislative responses),
- c) loss of a loved one or a key individual in a business – often causing both mental and/or physical health issues for the survivors from shock, grief and practical impacts of that loss,
- d) emerging or chronic physical and/or mental health conditions – especially when such conditions reach a life-threatening crisis, and
- e) financial crises resulting from the above factors and/or contributing to them.

Members have also reported a sharp increase in the prevalence of the latter three types of issue during the COVID-19 pandemic, where the impact of lockdowns, economic downturns and the requirement for many taxpayers to access government support for the first time has led to financial crises, mental and/or physical health problems and, most sadly, even deaths from suicide that have left survivors grappling with tax consequences.

### **4. Vulnerability affects taxation and superannuation compliance**

Members of the Committees recognise that there are numerous touch-points through the lifecycle of a vulnerable person's interactions with the taxation and superannuation system where either or both:

- a) The vulnerable person's physical and/or mental health conditions and financial crises may prevent them from being able to fully comply with their taxation and superannuation system obligations, and/or
- b) ATO actions to attempt to enforce such taxation and superannuation system obligations may negatively impact on the vulnerable person's mental and/or physical health, and where financial problems may prevent them being easily able to access professional assistance from lawyers and tax agents.

### **5. The Committees suggest that such taxation and superannuation touch-points include:**

- a. **Registration** – where a vulnerable person may not register, may register late or end up being de-registered due to dropping off the system over time. In practice, members have seen many examples where vulnerable persons have not registered as required under taxation and superannuation laws or have been de-registered, due to the impact of their serious physical and/or mental health conditions. This



may lead to ATO follow-up to enforce registration obligations OR to such de-registration.

- b. **Lodgement** - where a vulnerable person may not lodge or may lodge late. Taxpayers have fundamental obligations to lodge their tax returns or activity statements, etc. As practitioners, members have seen many instances where taxpayers experiencing severe physical and/or mental health issues failed to lodge as required under taxation and superannuation laws. This may lead to ATO follow-up to enforce lodgement obligations (including through lodgement enforcement prosecution) OR to use default assessment or estimation powers to create ATO-assessed liabilities AND to impose often-significant penalties on those resulting liabilities.
- c. **Correct reporting** - where a vulnerable person may not report accurately and fully, meaning that information originally provided to the ATO may be incorrect or incomplete. As practitioners, members have encountered individuals who were experiencing the impact of physical and/or mental health issues that resulted in incomplete/incorrect lodgements. This may lead to ATO amendment action to substitute ATO-assessed liabilities, often based on third-party information, default assessments or estimated liabilities.
- d. **Employer obligations** - where a vulnerable person may not meet some or all of their employer obligations, including those under the taxation and superannuation system. As practitioners, members have seen the impact of physical and/or mental health issues on business owners negatively impact the employer's ability to meet their obligations, including withholding and superannuation guarantee. Many businesses where the key individuals are suffering from physical and/or mental health issues are impacted where the key individual becomes unfocused, or steps away from the business, due to their health concerns. Many small businesses can suffer from periods of cash-flow problems, creating a cycle of being behind on their employer obligations, which are exacerbated by the vulnerable person's declining physical and/or mental health state.
- e. **Review or Audit** – where a vulnerable person may not be able to effectively deal with ATO review or audit activities due to their mental health issues. Depending on the taxpayer's prior lodgement and debt history, the ATO's approach to reviews and audits can differ widely – but a vulnerable person may end up being inappropriately risk-assessed as 'high-risk' due to multiple failures to comply. As practitioners, members have observed the ATO use a 'firmer action' on taxpayers who may not have effectively engaged with the ATO due to their severe physical and/or mental health issues. Instead of attempting to understand and work with the taxpayer based on understanding their personal circumstances that may impair them responding effectively to the ATO's queries, a continued review or audit can severely affect both a vulnerable taxpayer's physical and/or mental health state and future engagement with the ATO. This may lead to ATO follow-up to amend relevant assessments and impose often-significant penalties – sometimes without any response from the vulnerable taxpayer due to their physical and/or mental health issues.
- f. **Penalties** – where a vulnerable person may be penalised because of not meeting relevant taxation or superannuation obligations. As practitioners, members have frequently seen vulnerable persons being subjected to inappropriately higher levels of penalty AND encountering difficulties in obtaining remission of those penalties – sometimes even when they try to provide information regarding their physical and/or mental health condition to the ATO. This is because of a combination of the ATO assessment of the vulnerable person's conduct being

based on a lack of understanding of the taxpayer's true circumstances AND the vulnerable person not being able to effectively present their special circumstances to relevant ATO decision-makers, due to the impact of those same serious physical and/or mental health conditions.

- g. **Objection/Dispute/Litigation** – where a vulnerable person may not be able to effectively request or successfully run an objection, dispute or litigation – due to the impact of their severe physical and/or mental health condition. As practitioners, members have encountered situations where vulnerable people have been erratic and difficult clients during the pressure-filled stages of preparing for and running such objection, dispute and litigation cases. This may lead to ATO disallowance of objections or disputes and even applying for discontinuance of proceedings for want of effective prosecution, without ATO decision-makers recognising the impacts of the vulnerable person's physical and/or mental health condition.
- h. **Debt** – where a vulnerable person may not be able to meet debts arising from their taxation or superannuation obligations AND the impacts of their physical and/or mental health problems may prevent them from effectively seeking relief for serious hardship or compromise of relevant debts owing to the Commissioner. In the debt space, whether it be non-payment of outstanding tax debts and/or imposition of interest charges, this is a space that the ATO has substantial discretion and opportunity to listen to taxpayer's circumstances – as reflected in ATO Practice Statements and collection policies. However, as practitioners, members have seen time and time again where the ATO has not accepted physical and/or mental health reports prepared by qualified medical professionals when deciding whether or not to actively pursue debts and/or to impose or remit interest charges. Members have repeatedly seen the impact of continued imposition of interest<sup>1</sup> and penalties negatively impacting clients' physical and/or mental health, as they struggle to find ways to pay the additional debt (beyond the principal tax) while trying to support themselves and their families. In many situations, the taxpayers have had a sharp decrease in income (due either to the direct impact of their physical and/or mental health, taking time out to focus on those issues, or through other circumstances outside of their control that exacerbates their physical and/or mental health condition), and the continued 'chase' by the ATO for debt to be paid impact the taxpayer.
- i. **Prosecution** – where a vulnerable person may be referred for prosecution because of not meeting relevant taxation or superannuation obligations or not accurately reporting their affairs, when these failures arose because of their physical and/or mental health conditions. As practitioners, members often become involved at the late stage of prosecution, as vulnerable people may experience difficulties in dealing with the underlying compliance obligation – despite ATO behavioural economics 'nudge' warning strategies. Again, the ATO may not be aware of those physical and/or mental health conditions and the vulnerable person may not be able to effectively engage with the ATO to explain their true circumstances at those earlier stages. Members note the general recognition of such issues in the Commonwealth prosecution provisions<sup>2</sup> and in relevant guidance from the Director of Public Prosecutions on the decision to prosecute (or

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<sup>1</sup> Including General Interest Charges ('GIC')

<sup>2</sup> See section 19B of the *Crimes Act 1914*, at:

[http://www5.austlii.edu.au/au/legis/cth/consol\\_act/ca191482/s19b.html](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca191482/s19b.html), which deals with such circumstances by giving judicial discretion (at s.19B(1)(i)) to consider whether to dismiss or discharge subject to conditions, due to: 'the character, antecedents, age, health or mental condition of the person'

not)<sup>3</sup>. However, members report that this does not always readily translate into acceptance of evidence of such issues and appropriate actions being taken by ATO officers conducting delegated ‘in-house’ prosecutions on taxation offences.

## 6. Observations of Practical Issues Encountered by Members

In light of the experiences outlined in the case studies later in this submission, the Committees suggest that the following practical issues need to be addressed in better managing these issues through the recommended policy and practice changes by the ATO:

- a. *Differences between immediate aftermath of ‘natural disasters’ and longer-term impacts.* Members have observed that the ATO response to ‘natural disasters’ has improved over time and that the impacts of those events in creating time-sensitive temporary vulnerability for affected taxpayers is generally well-recognised by ATO staff. However, members report that the same cannot be said for longer-term vulnerability impacts of such events, where physical and/or mental health conditions develop after the stress of the relevant disaster and financial collapses may be more long-lasting – particularly feeding back into subsequent mental health crises.
- b. *Differences between ‘natural disasters’ and individual vulnerability.* Members also reported that the much-appreciated ATO response to the immediate aftermath of a ‘natural disaster’ covering a geographic area (delineated by affected post codes) is in sharp contrast to members’ experience with raising individual cases of taxpayer vulnerability with ATO staff. In the former situations, ATO staff seem well-informed of the need to take particular account of those vulnerable circumstances, while in the latter ATO staff either don’t seem to know how to respond or take a negative position regarding the reliability of the evidence of vulnerability.
- c. *Delays in seeking diagnosis and treatment.* Members report that many vulnerable people will delay reporting various illnesses and financial crises out of a sense of shame or stigma – especially for sufferers of mental health issues and victims of family violence. Further or alternatively, vulnerable people may not be able to fully articulate their condition or circumstances. Members report that this often results in a lack of any contemporaneous evidence of their case history and its impacts being available later, when the vulnerable person and the ATO try to engage regarding compliance touch-points.
- d. *Retrospective evidence of vulnerability.* Member’s report that such delays in diagnosis and treatment frequently lead to questions being raised by ATO staff regarding the accuracy of retrospective evidence provided by health professionals that refers to the vulnerable taxpayer’s case history and the likely impacts of the relevant vulnerability on the taxpayer’s obligations with the above touch-points.
- e. *Objective evidence of physical vs mental health conditions.* Members report that there is a tendency for ATO officers to be more likely to question, challenge or even reject evidence of a vulnerable person’s mental health condition/s, as opposed to that of physical illnesses. This reportedly results from a mistaken view that mental health conditions are less ‘real’ than such physical illnesses, where medical testing may be available to confirm the relevant diagnoses and medical practitioners’ opinion on the

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<sup>3</sup> See para 2.10 in the [Prosecution Policy of the Commonwealth \(cdpp.gov.au\)](https://www.cdpp.gov.au), which directs decision-makers to consider:

1. mitigating or aggravating circumstances impacting on the appropriateness or otherwise of the prosecution;
2. the youth, age, intelligence, physical health, mental health or special vulnerability of the alleged offender ...”

impacts of such physical illnesses is seen to be more 'objective' than for evidence from a mental health practitioner.

- f. *Risks of false claims of vulnerability.* More generally, members report that many contacts with ATO staff regarding the causes of the vulnerability of such clients are initially met with caution, disbelief and even outright rejection, especially when those vulnerabilities are disclosed later in the lifecycle of the relevant ATO case (after the relevant ATO staff have already formed their views of the vulnerable taxpayer's compliance posture). While members recognise that there may be some small risk of the most non-compliant taxpayers attempting to make false claims in an attempt to evade their obligations, this would seem to be a vanishingly small percentage of people claiming vulnerability, making an ATO organisational bias against accepting such evidence an entirely disproportionate response to that risk.
- g. *Regulatory disincentives of sharing vulnerability with Government.* Members report that some vulnerable clients are reluctant or even unwilling to share their true vulnerable circumstances with the ATO, due to the risk of that information being shared with other Government regulatory agencies – such as under statutory regimes containing a 'fit and proper person' test, like that for tax practitioners under the *Tax Agents Services Act 2009*.

## 7. Main Policy Recommendations

Recognising that the ATO has generally better developed approaches for dealing with natural disasters (at least in the short-term) and some financial crises (at least for debt collection decisions), the Committees recommend that the ATO should make specific policy and practice changes to articulate:

- a. the wide range of ATO decision-making on the above touch-points affecting taxpayers that should properly recognise such serious physical and/or mental health issues and related financial crises;
- b. the process that practitioners and their client taxpayers should follow in raising these matters with relevant ATO case officers to have that vulnerability recognised
- c. what those ATO staff should do in practice to recognise and respond to such issues – which will likely require training to support staff in recognising and dealing with those issues;
- d. specifying the range of types of independent medical and psychological evidence and/or related materials to have such vulnerability properly recognised by ATO case officers and their more senior leaders (perhaps including some standard questions/criteria);
- e. the range and types of adjustments (clarifying existing adjustments and considering further improvements) that the ATO should make to their decision-making on those touch-points to respond to seriously physically and/or mentally ill taxpayers who provide such acceptable independent evidence from suitably qualified medical and/or psychological experts.

## 8. Supporting Recommendations

- a. The Committees also recommend that that ATO should: further consult with practitioners through the BLS and other professional bodies on the development and implementation of these ATO policy and practice changes.

- b. consult with relevant medical and psychological or counselling professional bodies on how to support health practitioners in preparing such independent health professional evidence to assist vulnerable taxpayers suffering from physical and/or mental health problems affecting the above touch-points in having their vulnerability recognised by the ATO.
- c. take all necessary actions to ensure that information about vulnerable persons' status is **not shared** with other Government agencies without the express consent of the relevant vulnerable person – due to special sensitivity of these issues for such vulnerable taxpayers.
- d. update its website content to reflect all of the above recommended policy and practice changes that are implemented (noting the commentary on that website content at **Attachment B** later in this submission).

## **Attachment A – Case studies covering a range of examples from BLS members**

### ***Simple vulnerability vs greater complexity***

BLS members have reported that generally when taxpayers call the call centre for assistance, where the issue is 'simple' the ATO staff, following 'scripted solutions', can usually resolve the matter. However, in most circumstances, vulnerable taxpayers' situations are relatively complex and cannot be dealt with through such simpler 'scripted solutions'. Such complexity leaves taxpayers in a sort of 'limbo' with ATO staff having few ways to meaningfully engage with the vulnerable taxpayer to resolve issues affecting their tax and superannuation compliance.

For instance, members have cited favourable examples where notifying the ATO about a recently deceased taxpayer's estate needing a new Tax File Number was handled relatively quickly and easily through the ATO client contact centre, but that this experience did not extend to then effectively dealing with the understandable grief impacting on their surviving relative's ability in struggling to handle the deceased taxpayer's outstanding tax obligations.

### **1. Taxpayers with 'simpler' vulnerabilities having a *positive experience* with the ATO**

#### ***1.1. Elderly taxpayers with serious health and financial issues***

In this example, the elderly vulnerable taxpayer with serious health and financial issues had failed to lodge tax returns for many years. With the assistance of the BLS member and their tax agent, the vulnerable taxpayer was allocated to a team that dealt with similar issues. The team was sympathetic and understanding of the vulnerable taxpayer's circumstances. The ATO officers assisted the vulnerable taxpayer in getting up-to-date on their lodgement.

#### ***1.2. Vulnerable taxpayer who had a large debt as a result of the action of their partner***

In this example, the vulnerable taxpayer was subject to a large GST debt as a result of their former business partner lodging false partnership returns. Through the BLS member and their tax agent, the vulnerable taxpayer was allocated to a team that helped them resolve the tax issues in a timely and understanding manner.

#### ***1.3. Assistance provided to elderly taxpayer to continue engaging with the tax system***

In this example, an elderly taxpayer was having trouble obtaining a MyGov account and sought the assistance of the BLS member. The BLS member helped the taxpayer call the ATO client contact centre, with the vulnerable taxpayer speaking to a very helpful client service officer for over 90 minutes, who patiently explained the process of registering and waited for the taxpayer to get to each step before moving on. The vulnerable taxpayer reported that this made what had seemed like a very hard experience far easier to navigate.

**NOTE: The scenarios in the following more complex case studies in Sections 2, 3 and 4 are based on real cases but have been redacted and changed in several respects to remove any possibly identifying features, to protect the privacy of the relevant vulnerable taxpayers. Any resemblance to actual persons, living or dead, or actual events is purely coincidental. However, factually correct details of the cases on which these scenarios are based can be separately provided to the ATO on a confidential basis, to highlight the difficulties each of the vulnerable taxpayers encountered. In taking this action, the BLS notes that the ATO should already be organisationally aware of the details of each of these matters and that the ATO would**



**be prohibited from publishing such details under taxation secrecy laws and Privacy Act obligations.**

## **2. More complex situations for vulnerable taxpayers who were suffering from depression and suicidal ideation**

### *2.1. Vulnerable taxpayer suffering from physical health disorder, anxiety and depression – resulting in lodgement enforcement prosecution*

In this example, the vulnerable taxpayer had been suffering from a physical health disorder, acute anxiety and depression, and who therefore struggled to keep up with their taxation obligations.

The ATO initiated lodgement enforcement prosecution against the vulnerable taxpayer. When engaged, the BLS member raised the taxpayer's vulnerability and supporting medical and psychological evidence with the ATO in-house prosecution case officer – who reportedly refused to discontinue the prosecution action on several occasions, despite this evidence.

Eventually, the matter was reportedly only satisfactorily resolved with the ATO accepting these circumstances on the steps of the courthouse, which was unfortunately after the vulnerable taxpayer's psychological condition had apparently worsened due to significant further stress over that extended period and the taxpayer had incurred substantial costs for both the BLS member and a barrister to represent her.

### *2.2. Vulnerable taxpayer moved interstate to support their family whilst dealing with job uncertainty and then an ATO audit – resulting in diagnosed depression, anxiety and suicidal ideation*

In this example, the vulnerable taxpayer had been operating a small business for several years, while mainly working as an employee. The taxpayer had prepared and lodged business activity statements for that online business themselves to the best of their ability, as they were unable to afford support from a tax agent. When COVID-19 hit, the taxpayer lost their job, ceased being able to continue trading in the online business and had to move interstate with their new partner and their family – taking on full-time employment in a new city.

During that period, the ATO initiated a risk review on the vulnerable taxpayer's input tax credit claims for that small business, making various requests for information from business records. Following these ATO actions, the taxpayer was diagnosed with severe depression and anxiety, along with suicidal ideation.

The BLS member engaged with the ATO risk review team and shared medical and psychological evidence of the vulnerable taxpayer's mental health crisis and other information on the collapse in their finances. Instead of discontinuing the review, the ATO reportedly instead transitioned the case to an audit, with amended assessments expected soon – despite the ATO having been advised of the taxpayer's severe mental health risks and the taxpayer's dire financial situation. Instead, the audit team reportedly indicated that the taxpayer's ability to pay would need to subsequently be raised with the ATO Debt area, if amendments are made.

### *2.3. Vulnerable taxpayer suffering from depression (with suicidal ideation) and substance abuse disorder*

In this example, the vulnerable taxpayer sought the assistance of the BLS member who provided the ATO audit team several letters from their treating psychologists and doctors outlining the taxpayer's various medical and mental health issues that affected their ability to

meaningfully engage with the ATO during the audit and intended to help explain decisions made in their businesses. Through the BLS member, the taxpayer provided evidence of years of suffering from substance abuse disorders, which had caused the collapse of the taxpayer's finances and the failure of their businesses (the subject of the ATO audit action).

While it is still uncertain whether amendments will be made, the ATO audit team did not accept submissions to discontinue the audit on the basis of the taxpayer's dangerously declining mental health and their vulnerable financial situation (having no income or remaining assets). Instead, the audit team responded that the taxpayer's ability to pay would need to subsequently be raised with the ATO Debt area, if amendments are made.

#### *2.4. Vulnerable taxpayer grieving following loss of spouse - Taxpayer's loss and grief only accepted at one point*

In this example, the vulnerable taxpayer's spouse passed away after an extended illness. The taxpayer was unexpectedly assessed on a major transaction after an ATO audit, which created a substantial debt to the ATO. However, due to other circumstances outside their control, the taxpayer was unable to pay that debt for several years.

The BLS member was engaged to seek remission of General Interest Charges ('GIC') from the ATO Debt area, based on both the continuing mental health impacts of the vulnerable taxpayer's grief about losing their spouse and the delays being outside of the vulnerable taxpayer's control. The death of the taxpayer's spouse had initially been considered by ATO Debt around the time of the audit adjustment being made and some interest charges were reduced accordingly.

Despite several later submissions by the BLS member in favour of further GIC remissions, the Debt decision-makers subsequently refused to accept the impacts of the vulnerable taxpayer's ongoing grief from that loss and the resulting longer-term depression from which the taxpayer was suffering. In other words, the ATO Debt response reportedly implied that the taxpayer should have 'gotten over' their loss after the initial period of grief that had previously been accepted in the initial remission decision. This large amount of GIC continuing to accrue without remission reportedly led to the taxpayer suffering further distress and anxiety adversely affecting their mental health, until the Debt team agreed to remit most of the remaining GIC on other grounds (only when the BLS member sought an internal review of the refusal to remit GIC).

#### *2.5. Vulnerable taxpayer suffering from personality disorder affecting cognitive decision-making subject to ATO's 'Firm Action' strategy*

In this example, the vulnerable taxpayer was diagnosed with a personality disorder that impaired their ability to both understand and comply with their taxation obligations over time. This led to significant debts to the ATO arising and the taxpayer being subject to ATO 'firmer action' strategies for an extended period.

The vulnerable taxpayer's previous history with the ATO was reportedly 'messy', as the impacts of this personality disorder had frustrated efforts to resolve the compliance issues from both his perspective and that of the ATO. As part of the ATO 'firmer actions', the taxpayer had been subject to high level shortfall penalties and subsequent GIC on outstanding tax debts.

When the BLS member shared expert psychological evidence about the taxpayer's mental health vulnerability with the ATO to seek remission of those shortfall penalties and the GIC, the ATO team reportedly raised multiple procedural issues and even challenged the new psychological evidence on various grounds, rather than agreeing to the remission requests. The matter is still unresolved and may end up in litigation.



## 2.6. *Vulnerable taxpayer suffering from substance abuse disorder, addiction and depression*

In this example, the vulnerable taxpayer was suffering from depression that led to a severely addictive debilitating behaviour and a substance abuse disorder, becoming a chronic cycle for the taxpayer. The mental health disorders further resulted in a physical health condition, which is known negatively impact cognitive and executive decision-making functions.

The vulnerable taxpayer is now involved in a dispute with the ATO about events that occurred during that period. The taxpayer initially sought assistance from their tax agent, who had no success with engaging with the ATO Debt area on the taxpayer's behalf regarding these medical and psychological health issues. The BLS member is currently engaging with the ATO, while the taxpayer is struggling to get supporting retrospective medical and psychological evidence.

### **3. More complex situations for vulnerable taxpayers who were the victim of abuse (by a spouse, a family member, etc)**

#### 3.1. *Vulnerable taxpayer suffering from spousal abuse + Complex PTSD + serious medical conditions - subject to ATO's 'Firmer Action' strategy*

In this example, the vulnerable taxpayer was subject to severe spousal abuse (physical, psychological, and financial) at the hands of their former spouse for many years. Due to the level of coercive control the taxpayer's former spouse had over the taxpayer and their affairs, they were reportedly practically unable to effectively engage in meeting their taxation obligations. These circumstances reportedly contributed to significant compliance problems, which culminated in the ATO applying various 'firmer action' strategies against the taxpayer and their associated businesses. The taxpayer also suffers from a range of serious physical health conditions, which have worsened over the period of the resulting ATO disputes.

The vulnerable taxpayer engaged the BLS member to assist in their dispute with the ATO on a matter which includes high level shortfall penalties. Despite the taxpayer having now provided the ATO with written reports from several treating psychologists diagnosing them as suffering from Complex Post-Traumatic Stress Disorder and referring to their history of past systematic spousal abuse and coercive control, the ATO team have reportedly resisted revisiting the high levels of shortfall penalty originally imposed. The BLS member reports that the dispute team seems reluctant to reconsider the original audit assessment regarding the taxpayer's degree of 'culpability', despite the provision of new conflicting psychological evidence. The case is likely to result in litigation.

The vulnerable taxpayer has reported that the strain of the above experiences with the ATO have negatively impacted their ability to focus on their physical health conditions and to move forward or heal from the serious and pronounced spousal abuse that triggered their complex PTSD.

#### 3.2. *Vulnerable taxpayer suffering from spousal abuse + coercive control - Taxpayer surviving severe spousal abuse and suffering depression subject to large taxation debt during family settlement*

In this example, the vulnerable taxpayer was subject to spousal abuse (psychological and financial) and coercive control at the hands of their former spouse for many years – which included being made a director of several companies actually controlled by the former spouse. In the course of property settlement proceedings, the taxpayer reportedly discovered that one of those companies had unpaid employer obligations to the ATO, which the former spouse apparently attempted to use as 'leverage' in negotiations.

As a result of engaging the BLS member, the vulnerable taxpayer was able to successfully resolve the ATO debt problem. However, this reportedly took an extended period because the ATO did not agree to be joined as a party to the family law property settlement proceeding to deal with the employer obligation debt issue, despite recent changes to the *Family Law Act 1975* intended to deal with such situations.

The vulnerable taxpayer reported that they had been extremely distressed by this potential liability and that the delays during the process of trying to resolve the issue with the ATO had adversely impacted on their mental health conditions during that period. However, when the ATO issue was finally resolved satisfactorily so that the property settlement could then proceed, the taxpayer reportedly felt enormous relief in that 'weight finally being lifted off' them.

3.3. *Vulnerable taxpayer suffering from spousal abuse + coercive control - Taxpayer unable to meet lodgement and compliance obligations as former spouse continues to coercively control the taxpayer during the family settlement*

In this example, the vulnerable taxpayer was subject to severe spousal abuse (physical, emotional and coercive control). Both the taxpayer and her former spouse were joint directors and trustees of a family trust. Legislative requirements need both directors of the trustee company to sign documents, and in this example, the former spouse had reportedly used this as a 'bargaining chip' during the family law property settlement negotiations.

With the assistance of the BLS member, the vulnerable taxpayer approached the ATO for an initial extension of time to lodge, which was granted. Given continued delays in lodgement, the taxpayer is reportedly becoming increasingly concerned about whether a further extension will be granted and how penalties and interest might be applied in this situation.

3.4. *Vulnerable taxpayer suffering from elder financial abuse by criminal family member and elder appointed a director of a company which later accrued a large debt*

In this example, the vulnerable elderly taxpayer was subject to physical and psychological abuse at the hands of a family member. The family member pressured the elderly taxpayer to enter into an arrangement that left the taxpayer exposed to a large taxation debt to the ATO.

Once they became aware of the ATO debts, the elderly taxpayer sought assistance from the BLS member. Despite providing details and supporting evidence of the elderly taxpayer's true circumstances, the ATO has so far reportedly been unwilling to accept the elderly taxpayer's vulnerable circumstances (elder abuse and family violence) and continues to pursue the elderly taxpayer for the taxation debt to the ATO. This matter may end up in litigation.

#### **4. More complex situations for vulnerable taxpayers and/or their family suffering from physical health conditions**

4.1. *Vulnerable taxpayer whose family were suffering from debilitating physical health condition – Taxpayer falling behind on tax obligations as a result of focusing on family support and medical bills*

In this example, the vulnerable taxpayer's spouse and one of their children were suffering from a debilitating disease that meant neither of them were able to work and required treatment overseas. In addition, the family required a range of expensive medications and therapies to help with the chronic pain from this illness.

Due to the ongoing stress of supporting the family in dealing with these illnesses, the taxpayer struggled to keep up with their tax obligations – especially for their small business.

The taxpayer continued to meet their lodgement obligations and continued to make wages and super payments to keep their workers employed but struggled to keep up with tax payments – resulting in a growing tax debt.

The vulnerable taxpayer engaged the BLS member to represent seeking remission of GIC and provided detailed medical information of the family members and indicated the level of support the taxpayer was providing. Despite this, the taxpayer was reportedly asked to explain how supporting their family was impacting them financially and their ability to pay tax obligations at the time – including questioning how they had been able to run their business in these circumstances, referring to relevant ATO policies.

Eventually, the taxpayer received a full remission of GIC, but reportedly only after the BLS member repeatedly explained the taxpayer's situation to several case officers/managers and outlined in greater detail the amount and type of support (both emotional, physical and financial) that the taxpayer provided to their family as they continued to suffer from a debilitating disease.

#### 4.2. *Vulnerable taxpayer director suffering from terminal illness – subject to ATO debt collection action*

In this example, an elderly vulnerable taxpayer is suffering from terminal illness and has been in-and-out of hospital for various treatments for an extended period. During that period, the taxpayer was reportedly unable to effectively manage their tax affairs, due to the seriousness of their physical health condition and the impact of medical treatments. Unfortunately, this led to a significant ATO debt arising.

A few months ago, the ATO commenced collection action against issued the vulnerable taxpayer for this debt. The taxpayer's tax agent reported that when they attempted to contact the ATO to explain these physical health issues and the vulnerable taxpayer's circumstances, the ATO officer was 'unsympathetic' and indicated that the taxpayer would have to 'go to court'

The BLS member has reportedly recently been engaged to liaise with the ATO to make submissions and provide medical evidence about the vulnerable taxpayer's terminal illness, in the hopes of now resolving the ATO debt matter – without having to 'go to court'.

Meanwhile, the vulnerable taxpayer and family are reportedly struggling to deal with these issues in addition to this terminal illness and their respective mental health responses to this sad situation.

## Attachment B – Existing ATO website content

### 1. Current information available on the ATO website

Currently, the ATO website includes very generalised information for taxpayers to receive assistance. The page '[Support in difficult times](https://www.ato.gov.au/General/Support-in-difficult-times/)'<sup>4</sup> provides links to various types of support offered by the ATO and other not-for-profit organisations to assist taxpayers experiencing financial difficulties that may affect the taxpayer's mental health and wellbeing.

The first link on the 'Support in difficult times' page is to 'Getting support'<sup>5</sup>, where the ATO website states: "We're committed to helping those who need help with their tax and super obligations and entitlement in difficult times". Further down the page the phone numbers for Beyond Blue and Lifeline are provided. This page does not specify what kind of 'support' the ATO can or will provide to such vulnerable taxpayers, nor the types of situations in which the taxpayer can ask for such support.

The second link on the 'Support in difficult times' page is to 'Support for different circumstances'<sup>6</sup>, where the ATO lists four 'unexpected life events' that taxpayers may be dealing with, including COVID-19, family and domestic violence, deceased estates and natural disasters and drought.

Below the COVID-19 heading, the ATO has included links to various COVID-19 support pages across the ATO website, the Beyond Blue website and phone number for mental health support and suggested speaking to your registered tax professional or calling the ATO for tax help. No specific options have been provided on the page on the types of circumstances the ATO will assist in and how the ATO can help. Members have also expressed some concerns about this content referring vulnerable taxpayers to their 'registered tax professional' when there are no obvious gateways or processes for members or other tax professionals to engage with the ATO on behalf of such vulnerable clients.

Below the Family and Domestic violence heading the ATO has provided a generic statement that they understand people suffering from family and/or domestic violence may need assistance. The ATO has included the general individual enquiry number (13 28 61) but gives no clear indication as to what the ATO's approach will be or who a vulnerable taxpayer will be speaking to if they call the ATO to discuss their circumstances. Members have reported that their client's experiences with this channel have been largely negative, as reportedly the ATO officers in the call centre have seemed lacking in understanding of these vulnerability issues and what to do in response to a vulnerable taxpayer trying to engage with the ATO about them.

Below the Deceased estates heading, the ATO has identified that there may be tax and superannuation issues as a result of a person's death, but has not provided any information on support for grieving family members as to how best to engage with the ATO during an emotionally stressful period. Members have reported that vulnerable clients experiencing grief, depression, financial stress and a lack of practical understanding of relevant financial affairs after the recent death of a spouse or family member have struggled in trying to engage with the ATO in those circumstances.

Below the Natural disaster and drought heading, the ATO has provided ways in which the ATO is supporting affected taxpayers, including "faster processing of any tax refunds owing, reconstructing records, non-taxable treatment of insurance payouts, and fuel tax credits and

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<sup>4</sup> <https://www.ato.gov.au/General/Support-in-difficult-times/> QC 57756 Last modified 14 July 2021

<sup>5</sup> <https://www.ato.gov.au/General/Support-in-difficult-times/Getting-support/> QC 62917 Last modified 16 July 2021

<sup>6</sup> <https://www.ato.gov.au/General/Support-in-difficult-times/Support-for-different-circumstances/> QC 62918 Last modified 11 May 2021

zone offsets”. The ATO has provided a phone number to call for assistance or suggested that the taxpayer speak to their registered tax professional. This section is a good example of where the ATO has identified how they are able to assist vulnerable taxpayers that have been affected by an event outside of their control.

The fifth link on the ‘Support in difficult times’ page is to ‘Help getting back on track’<sup>7</sup> which outlines three situations a taxpayer may be in; 1) Unable to lodge on time, 2) Unable to pay tax bill and 3) Experiencing serious hardship. Below the heading ‘I can’t pay my tax bill’ the ATO has listed ways in which they can help including:

- Set up an affordable payment plan
- Fast track any tax refund you are owed
- Defer a compulsory repayment
- Prevent a tax refund you may be due to receive from being used to pay debts with other government organisations
- In special circumstances, we can release you from paying some taxes if paying the taxes would cause serious hardship

There is no mention of taxpayers who may be suffering from physical and/or mental health issues that are impacting their ability to engage with the ATO and pay any outstanding taxation liabilities.

Below the heading ‘Support during serious hardship’, the ATO has included the following situations that may result in financial hardship:

- Loss of employment
- Housing crisis
- Facing eviction or disconnection of essential services such as water, electricity or gas
- Marriage or relationship breakdown severely affecting your financial circumstances

Once again, there is no mention of physical and/or mental health issues that may impact a taxpayer’s ability to function and the impact this may have on their financial position. For example, addiction (to drugs, alcohol, gambling, etc) may severely impact the financial position of a taxpayer. There is no clear guidance provided as to how the ATO may consider such issues, which members report appears to deter such vulnerable taxpayers from engaging with the ATO about their physical and/or mental health conditions and their resulting financial difficulties.

The sixth link on the ‘Support in difficult times’ page is to ‘Tailored support for different needs’.<sup>8</sup> This page outlines support for three broad group of people: 1) people with disabilities and carers, 2) Aboriginal and Torres Strait Islander peoples, and 3) Culturally and linguistically diverse. Again, this page does not offer any information on support for people suffering from physical and/or mental health issues that may be affecting their ability to engage with their taxation obligations.

The seventh link on the ‘Support in difficult times’ page is to ‘Support for tax professionals’.<sup>9</sup> This page indicates that the ATO can assist tax professionals in managing their clients’ and their own tax obligations. The ATO has provided the following as a range of support options:

<sup>7</sup> <https://www.ato.gov.au/General/Support-in-difficult-times/Help-getting-back-on-track/> QC 62921 Last modified 15 March 2021

<sup>8</sup> <https://www.ato.gov.au/General/Support-in-difficult-times/Tailored-support-for-different-needs/> QC 62922 Last modified 26 June 2020

<sup>9</sup> <https://www.ato.gov.au/General/Support-in-difficult-times/Support-for-tax-professionals/> QC 62923 Last modified 30 October 2020

- Help with your lodgement program
- Serious hardship or adverse circumstances
- Complex issues resolution service
- Cash flow coaching kit
- Online access to deceased estate information

The page includes a link to another page called 'Support for your practice'. This page provides minimal information, especially around physical wellbeing and mental health support.

The eighth link on the 'Support in difficult times' page is to 'Support for small businesses'.<sup>10</sup> This page outlines several circumstances that could negatively impact on the quality of life of a taxpayer and their ability to run a business including 'everyday pressures, unexpected life circumstances, stress, depression or anxiety'. The ATO has provided 'common warning signs' of when a taxpayer may need to reach out for support:

- Finding it hard to concentrate
- Avoiding necessary day-to-day tasks and obligations
- Feeling irritable, stressed or teary
- Constantly thinking of work, even during personal time
- Being unable to sleep
- Disconnecting from friends and family
- Changing eating or drinking habits.

Helpfully, the ATO has suggested that they can assist by: setting up a payment plan, deferring a lodgement or payment and fast tracking a tax return.

The ninth and final link on the 'Support in difficult times' is 'Health and wellbeing organisations'.<sup>11</sup> This page lists links to the following organisations:

- Ahead for Business
- Beyond Blue
- Business in Mind
- Head to Health
- Heads Up
- Kids Helpline
- Lifeline Australia
- Mates in Construction
- ReachOut
- Suicide Call Back Service

While useful referral sites for people suffering mental health crises or chronic issues, this section unfortunately also does not provide any guidance of how a vulnerable person suffering from a mental health crisis should engage with the ATO when those issues are

<sup>10</sup> <https://www.ato.gov.au/General/Support-in-difficult-times/Support-for-small-businesses/> QC 62924 Last modified 6 April 2021

<sup>11</sup> <https://www.ato.gov.au/General/Support-in-difficult-times/Health-and-wellbeing-organisations/> QC 49567 Last modified 29 April 2020



affecting the vulnerable taxpayer's ability to comply, nor what the ATO officers whom they may contact should be able to do to address those problems.

## 2. What is missing from the ATO guidance?

Helpfully, the above ATO websites pages indicate factors that may negatively impact a taxpayer's wellbeing and mental health and provides links to external agencies that can provide support. However, the assistance offered to taxpayers by the ATO appears to be limited to payment plans, applications for serious hardship and referring a vulnerable taxpayer to a tax professional for assistance.

Unfortunately, the majority of the guidance available online 'pushes' taxpayers to contact their advisors, accountants and lawyers to obtain assistance with their tax obligations if they are suffering from a mental health illness. BLS members note that advisors, accountants and lawyers are not the appropriate professionals to support taxpayers suffering from mental health illness and that their services may not be appropriate for vulnerable people who are also in financial crisis, as such people are unlikely to seek professional assistance where they cannot afford that professional's fees.

Critically, the existing material does not provide vulnerable taxpayers or tax professionals with any clear guidance on how the ATO can actually help to address a vulnerable taxpayer's difficulties in meeting their tax obligations. Further, the assistance that is offered is largely limited to certain circumstances and is subject to multiple conditions which a vulnerable person suffering from a physical and/or mental health crisis may not be able to meet. For example, for a payment plan, the taxpayer must be able to afford payments, the taxpayer must not have previously defaulted on a payment plan more than twice in the past two years, and taxpayer must have be up to date on lodgements. Further payment plan conditions<sup>12</sup> include:

- All tax credits and refunds will be used to reduce the tax debt but won't replace the required instalment payment,
- General interest charge will continue to accrue until the debt is paid, and
- Future lodgements need to be made on time to maintain a payment plan.

As there is no clear guidance on how the ATO will treat vulnerable taxpayers when they are suffering from physical and/or mental health vulnerabilities that can negatively impact their ability to engage effectively with the ATO and to meet their taxation obligation, taxpayers and tax professionals receive varying responses from ATO staff of the type illustrated by the above case study examples.

Further, some BLS members have reported that their experience with ATO officers is that there appears little recognition or understanding that financial problems can create mental or even physical health problems and that physical and/or mental health problems can create financial problems.

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<sup>12</sup> <https://www.ato.gov.au/Calculators-and-tools/Payment-plan-estimator/>  
Improving how the ATO deals with vulnerable taxpayers

## Attachment C - Relevant legislative context

### 1. Legislation

At the highest level, BLS members note that the Commissioner is obligated to comply with relevant legislation governing Federal government agencies, most notably in the *Public Governance, Performance and Accountability Act 2013* ('**PGPA**'), in which Section 15 of the PGPA states:

#### **Duty to govern the Commonwealth entity**

(1) The accountable authority of a Commonwealth entity must govern the entity in a way that:

- (a) promotes the proper use and management of public resources for which the authority is responsible; and
- (b) promotes the achievement of the purposes of the entity; and
- (c) promotes the financial sustainability of the entity.

Members note that the first two sub-paragraphs in this section articulate potentially competing principles governing the ATO's activities. In making relevant decisions, the first principle requires efficient use of resources in getting a return on public resources, the second principle looks at the strategic effectiveness in achieving the purposes of the entity. As the ATO's Corporate Plan and Annual Report both recognise, the vast majority of taxpayers voluntarily comply with their taxation and superannuation obligations – which is built on people's trust and confidence in the ATO's administration of the system.

Importantly, members argue that public examples of the ATO failing to properly deal with serious physical and/or mental health issues for vulnerable people have enormous potential to erode that trust and confidence, resulting in significant threats to the high levels of voluntary compliance that Australia currently enjoys. The recommendations that are made in this submission are intended to assist the ATO in better dealing with issues affecting taxation and superannuation compliance by vulnerable people suffering from serious physical and/or mental health conditions in order to maintain and even increase that trust and confidence and therefore those levels of voluntary compliance.

For example, members argue that, while:

1. raising an assessment through pursuing an audit of a vulnerable person with a serious physical and/or mental health issue might result in the efficient creation of a liability, doing so may have a negative impact on that person's mental health – which if it became publicly known might erode trust and confidence in the ATO's administration and then negatively impact on levels of voluntary compliance with the taxation and superannuation systems.
2. pursuing a debt against a vulnerable person with a serious physical and/or mental health issue might be an efficient use of public resources, doing so when that person has also suffered a financial collapse and has limited or no assets to pay is again likely to erode trust and confidence in the ATO's administration and then negatively impact on levels of voluntary compliance with the taxation and superannuation systems.
3. both decisions are put together, i.e. running such an audit and then pursuing a debt raised against a vulnerable person suffering from both a serious mental health condition and is asset-less following a financial collapse, then those negative impacts appear even more likely.



Members suggest that similar issues especially arise in matters involving disputes which reach litigation, as reported cases which are shown to have involved vulnerable people whose serious mental health condition has not properly been recognised and dealt with by the ATO are likely to give rise to public criticism, again eroding trust and confidence in the ATO's administration and then negatively impacting on levels of voluntary compliance with the taxation and superannuation systems.

## 2. Commissioner's discretion

- 2.1. *At the highest level, BLS members note that the Commissioner is obligated to comply with the relevant legislation governing Federal general power of administration*

At the highest level, BLS members note that the Commissioner is obligated to comply BLS members note that the Commissioner has a general power of administration ('GPA') over various acts which the ATO administers and that implicit in that power is a general discretion as to the allocation of resources and the guidance of ATO staff.

While referenced in many ATO Practice Statements, the most complete explanation of the GPA appears to be contained in *PS LA 2009/4 When a proposal requires an exercise of the Commissioner's powers of general administration*<sup>13</sup>. While this explanation is presented in the context of looking at opportunities for the ATO to apply the GPA to avoid 'unintended consequences' in implementation of tax laws, this Practice Statement does include, *inter alia*, the following guidance to ATO staff:

### 4. Circumstances in which the Commissioner's GPA may be properly exercised

The courts have recognised that the general administration provisions reinforce the principle that the Commissioner is authorised to do whatever may be fairly regarded as incidental to, or consequential upon, the things that the Commissioner is authorised to do by the taxation laws.<sup>[4]</sup>

The GPA are narrow in scope and governed by the operation of administrative law principles. A proper exercise of the powers is confined to dealing with management and administrative decisions, such as the allocation of compliance resources more broadly recognised as practical compliance approaches.

The Commissioner's GPA cannot be used to remedy defects or omissions in the law. It is the Commissioner's remedial power which provides discretion to modify the operation of a tax law to ensure it can be administered to achieve its intended purpose or object.<sup>[5]</sup>

The scope and extent of these powers is outlined in greater detail in Appendix B of this practice statement.

### 5. The appropriate authority to exercise the Commissioner's GPA

The *Carltona*<sup>[6]</sup> principle allows employees to exercise the GPA on the Commissioner's behalf, but only when there is an *implied authority* for them to do so.<sup>[7]</sup>

An implied authority to exercise the GPA on the Commissioner's behalf exists if it is within the scope of your usual duties to make a judgment call or decision that affects the allocation of resources, including your own time. Generally speaking such every day decisions are made by officers at all levels in the course of their usual duties.

The Commissioner has expressly delegated the following GPA (neither of which is within the scope of this practice statement):

- the settlement of cases<sup>[8]</sup>, and
- the compromise of tax debts.<sup>[9]</sup>

<sup>13</sup> Accessed at <https://www.ato.gov.au/law/view/document?docid=PSR/PS20094/NAT/ATO/00001>

If a judgment call or decision needs to be made that is not necessarily within the course of your usual duties, you may need to consider preparing a proposal as to whether it is appropriate for the Commissioner to exercise his or her GPA in the circumstances.<sup>[10]</sup>

Members argue that the reference to ‘circumstances’ in this context should include ATO staff considering the vulnerability of taxpayers of the types discussed in this submission.

Further, the Practice Statement also provides explanation of the GPA in the following terms:<sup>14</sup>

#### “APPENDIX B - THE COMMISSIONER'S GPA EXPLAINED

What the general administration provisions are designed to do

1. The general administration provisions place the day to day administration of various tax laws in the hands of a statutory office holder, the Commissioner of Taxation.
2. Judicial discussion of the general administration provisions shows that the courts accept that these provisions reinforce the principle that the Commissioner is authorised to do whatever may be fairly regarded as incidental to, or consequential upon, the things that the Commissioner is authorised to do by the tax laws.<sup>[16]</sup> For example:

The Commissioner's decision to audit taxpayers, even at random, is supported by the GPA (*Industrial Equity Ltd v Deputy Commissioner of Taxation* [1990] HCA 46 and *Knuckey, Ross Randall v Commissioner of Taxation of the Commonwealth of Australia* [1998] FCA 1143).

The Commissioner's power to settle or compromise proceedings to which he is a party is derived from the GPA (*Grofam Pty Ltd & Ors v The Commissioner of Taxation of the Commonwealth of Australia* [1997] FCA 660).

3. The provisions do not authorise the Commissioner to administer the taxation laws inconsistently with their purpose or object, whether express or implied, or their plain meaning. They support the principle that the Commissioner must interpret and administer each Act to give effect to its intention as discerned from it as a whole, not, for example, by interpreting a particular section in isolation from the rest of the Act. The provisions must be interpreted having regard to the context in which they appear. The GPA include and augment the specific powers given to the Commissioner by the Act: *Industrial Equity Ltd v Deputy Commissioner of Taxation* [1990] HCA 46; *Hutchins, Peter Graeme v Deputy Commissioner of Taxation* [1996] FCA 201.

[Table omitted]

#### **Conflicting priorities: revenue collection versus duty of good management**

4. In exercising the powers conferred on him or her, the Commissioner must reconcile various duties and powers. For example, one duty is to collect the revenue properly payable under the law. The courts have described the Commissioner's duty as:

...to ensure that the correct amount of tax is paid, 'not a penny more, not a penny less'<sup>[19]</sup>

And:

...to collect tax in accordance with a correct assessment, that is to say, to collect the correct amount of tax, no more and no less. If an assessment is excessive it would be improper for the Commissioner to seek to collect tax payable under it.<sup>[20]</sup>

5. That duty must be reconciled with the Commissioner's duty of good management. Having regard to the competing duties and powers that arise under the taxation laws, the courts have acknowledged that the Commissioner must make administrative decisions as to the allocation of scarce resources to achieve an optimal, though not necessarily the maximum, revenue collection. This ensures that the Commissioner is not obliged, for example, to pursue every last cent of revenue where the cost of doing so is prohibitive.

<sup>14</sup> Accessed at <https://www.ato.gov.au/law/view/document?docid=PSR/PS20094/NAT/ATO/00001>

6. This 'conflict' of duties was described in the English case *Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617. At page 651, Lord Scarman of the House of Lords considered the equivalent administration power of the Inland Revenue Commissioners. He said that:

... in the daily discharge of their duties inspectors are constantly required to balance the duty to collect 'every part' of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.

He observed that the relevant statutory provisions:

... establish a complex of duties and discretionary powers imposed and conferred in the interest of good management upon those whose duty it is to collect the income tax ... I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise, to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.

7. The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) supports the duty of good management. Section 15 of the PGPA Act imposes a general obligation on the Commissioner to manage the affairs of the ATO in a way that promotes proper use of the public resources for which the Commissioner is responsible. 'Proper use' in this context means that the Commissioner needs to make decisions about the allocation of ATO resources to compliance and other activities which promote the efficient, effective, economical and ethical use of those resources. However in doing so he must still comply with the law (section 14 and subsection 13(4) of the *Public Service Act 1999*) and government policy (section 21 of the PGPA Act).

8. When the Commissioner, or a tax officer acting in the course of his or her duties, considers that a course of action is justified by the duty of good management, but requires the Commissioner to assume a power that can only be implied by reference to a general administration provision, the tax officer should bear in mind that the exercise of any power is constrained by the principles of administrative law.<sup>[21]</sup>

9. Section 16 of the *Taxation Administration Act 1953* restricts the operation of the GPA. In an exception to the general rule, any payments made under the general administration provisions are not able to be paid out of the Consolidated Revenue Fund.

#### **Framework within which the Commissioner's GPA must operate**

10. The GPA are constrained by the principles of administrative law. These principles govern whether:

the administrative authority has the power to deal with the subject matter, or  
the mode in which the authority deals with the matters entrusted to it, satisfies certain standards that have been developed by the courts in interpreting the common law.<sup>[22]</sup>

[Table omitted]"

Flowing from the above analysis, members argue that the ATO should apply the 'good management rule' in the types of circumstance discussed in this submission to better deal with vulnerable taxpayers. Members recommend that this be done by the ATO balancing the strict collection of revenue under the law with the adverse impacts on voluntary compliance and community confidence that would flow from it becoming publicly known that the ATO is treating such vulnerable taxpayers inappropriately in those circumstances.

## 2.2. *Specific statutory discretions*

Further, the Commissioner has various specific statutory discretions in several aspects of tax administration (often after considering a taxpayer's mental health), including:

- Remission of administrative penalties for failure to comply with taxation obligations (s298-20 Sch 1 TAA)
- Remission of general interest charge for later payments (s8AAA TAA)
- Deferral of liability to pay tax (Subdiv 255-B Sch 1 TAA) and HELP debts (*Confidential v FCT*<sup>15</sup>)

Where a vulnerable taxpayer continues to carry on their ordinary business activities, per *Sharkey v FCT*<sup>16</sup> the fact that a taxpayer is able to continue carrying on their ordinary business may mean that their ill-health is given less weight in remission decisions. Members note that this is fortunately inconsistent with guidance in PSA LA 2011/12 and PSA LA 2006/8, where the Commissioner helpfully states that the ill-health of a sole trader or key personal of a small business taxpayer will be considered in determining whether to remit general interest charges.

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<sup>15</sup> [2010] AATA 756

<sup>16</sup> [2007] AATA 1435; 2007 ATC 2218

## Attachment D - Relevant ATO policy & guidance

### 1. Specific ATO guidance

#### 1.1. PS LA 2006/8 – Remission of shortfall interest charge and general interest charge for shortfall periods<sup>17</sup>

Within this Practice statement, ‘illness’ is mentioned once in the context of circumstances where there is a delay in providing information and documents during an audit which is outside the taxpayer’s control.

The guidance states that ‘it may be appropriate ... to grant full remission for the period of a delay where the taxpayer can demonstrate the delay in supplying information or documents for the audit... directly attributable to: ... the serious illness of the taxpayer or key personnel where there is no other person that could have mitigated the length of the delay’.

There is no clear guidance or framework to determine what ‘serious illness’ includes (i.e. judging severity), what information is required from the taxpayer to show that they are suffering from such a ‘serious illness’ and how the ATO officers should consider this information in deciding whether to exercise this discretion.

#### 1.2. PS LA 2007/3 – Remission of penalty for failure to comply with requirements in relation to tax invoices, adjustment note or third party adjustment notes<sup>18</sup>

This Practice statement does not mention ‘illness’ at all. The guidance around ‘remission’ is covered in just over one paragraph. The guidance states:

‘The following are the general principles you need to bear in mind when making the remission decisions:

- Your decision should be made based on the individual circumstances of the case,
- Your decision should be consistent with the principles of the taxpayers’ charter and the compliance model...’

There is no clear guidance or framework on what ‘individual circumstances’ should be considered by the ATO when deciding on a remission application. For taxpayers and tax advisors, there is no framework on how to raise serious vulnerability, and what information or evidence should be provided to support them in raising that vulnerability.

#### 1.3. MT 2008/1 – Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard<sup>19</sup>

This miscellaneous taxation ruling provides more detail of how to consider ‘ill health’ for the assessment of penalties by providing an example. Under the heading ‘*Personal circumstances*’ at paragraph [47], the ruling states ‘person circumstances have the potential to compromise a person’s capacity to comply with their tax obligations. For example, age, mental health or physical incapacity may adversely affect the level of care and attention that can reasonably be expected in the circumstances’.

The ruling provides an example at paragraph [48] – [49] of a taxpayer who has been diagnosed with cancer and the impact that would have had on her record-keeping abilities. The ruling concludes that taking into account the taxpayer’s personal circumstances

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<sup>17</sup> Accessed at

<https://www.ato.gov.au/law/view/document?locid=%27PSR/PS20068/NAT/ATO/ft5%27&PiT=20100701000001>

<sup>18</sup> Accessed at <https://www.ato.gov.au/law/view/document?docid=PSR/PS20073/NAT/ATO/00001>

<sup>19</sup> Accessed at

<https://www.ato.gov.au/law/view/document?LocID=%22MXR%2FMT20081%2FNAT%2FATO%22&PiT=99991231235958>

(diagnosed with cancer, emergency surgery and intensive chemotherapy), it would be reasonable to conclude the taxpayer had exercised reasonable care.

This example provides some guidance to taxpayer and tax advisors on the level of ‘serious illness’ that may be considered during a remission application. In addition, this is one of the only guidance pieces that mentions ‘mental health’ as a ‘personal circumstance’ that impacts a taxpayer’s ability to meet tax obligations. However, members note that the guidance does not cover the types of supporting evidence that should be provided or how that evidence should be evaluated by ATO decision-makers.

#### 1.4. PS LA 2011/12 – Remission of General Interest Charge<sup>20</sup>

This PS LA provides guidance on circumstances in which a remission of general interest charge is appropriate. Guidance under the heading ‘*Where the delay was not caused by the client*’ provides examples of circumstances that are considered, including natural disasters, industrial action, unforeseen collapse of a major debtor of the client, or the sudden ill health of the key personnel in sole trader or small business situations.

Similar to the guidance in PS LA 2006/8, there is no clarity on what information or evidence needs to be provided by the taxpayer for ATO consideration, and no framework for ATO decision makers on how to consider vulnerability information provided in order to make an appropriate decision.

#### 1.5. PS LA 2011/17 – Debt relief, waiver and non-pursuit<sup>21</sup>

Under the guidance on the ‘*Waiver application process*’ the Practice Statement outlines that information that is relevant to an application and will be provided to the Department of Finance includes ‘any history/background to the case, including any available information on the taxpayer’s assets, income, future income earning capacity, other debts, health and family circumstances’ (emphasis added).

As mentioned above, physical and/or mental health problems in many circumstances create financial problems, and vice versa, financial problems can create mental and even physical health problems. As a result, this particular Practice Statement is key to those looking for guidance on the best way to resolve taxation debt issues. However, members note that this guidance still does not cover the supporting evidence that vulnerable taxpayers or their supporting practitioners should provide or how ATO decision-makers should evaluate such evidence.

#### 1.6. PS LA 2011/19 – Administration of the penalty for failure to lodge on time<sup>22</sup>

This PS LA provides a short list of examples where remission of penalty is appropriate and also not appropriate. The examples of where remission is appropriate includes:

- ‘taxpayer or their agent was sick with a severe life-threatening illness such as battling cancer’
- ‘taxpayer was caring for another person who was sick with a severe life-threatening illness’

The examples where remission may not be appropriate, include:

- ‘taxpayer could not lodge because they were sick with a cold (or other short-lived non-severe illness)’

<sup>20</sup> Accessed at <https://www.ato.gov.au/law/view/document?DocID=PSR/PS201112/NAT/ATO/00001>

<sup>21</sup> Accessed at <https://www.ato.gov.au/law/view/document?DocID=PSR/PS201117/NAT/ATO/00001&PIT=99991231235958>

<sup>22</sup> Accessed at <https://www.ato.gov.au/law/view/document?DocID=PSR/PS201119/NAT/ATO/00001&PIT=99991231235958>



Members suggest that a differentiation between ‘severe life-threatening illness’ and ‘short-lived non-severe illness’ may be unhelpful. For example, there is no clear guidance or framework on how severity is to be determined, and consideration of ‘severe’ illness that may not be perceived outwardly as ‘life-threatening’. Members emphasise that with many mental illnesses, individuals may not seek assistance from professionals for a long period of time or it may inwardly feel more ‘severe’ than it appears outwardly and may have varying periods of intensity followed by periods of greater ‘health’.

#### 1.7. PS LA 2014/4 – Default assessment penalty<sup>23</sup>

This Practice Statement provides guidance that the Commissioner has discretion to remit penalties imposed for default assessments. Under the heading ‘*Circumstances beyond the entity’s control*’, circumstances where remission would be appropriate, which includes natural disaster, ill health (or ill health or death of key personnel), or impeded access to records.

*Example 3* of the Practice Statement considers a taxpayer who was unable to attend to their tax affairs due to ill-health. The example shows a situation where the taxpayer has not lodged their tax return and after several attempts at contact by the ATO default assessments were raised based on employer records. The example states that although the taxpayer was ill, he was able to maintain full-time employment and therefore no indication that he could not lodge his tax return.

Whilst this example may seem appropriate for the context of this Practice Statement, members argue that vulnerable taxpayers may maintain full-time employment for a range of reasons – including the need to support their family financially. Members suggest that there shouldn’t be a blanket assumption that if a taxpayer is working full-time and is still suffering from an illness, that the illness mustn’t be regarded as ‘severe’. Members sadly note the many instances of vulnerable taxpayers who were employed full-time or were running small businesses who regrettably commit suicide as a result of serious depressive illnesses each year.

<sup>23</sup> Accessed at <https://www.ato.gov.au/law/view/document?docid=PSR/PS20144/NAT/ATO/00001>

## Attachment E - Academic and social research

### 1. Academic guidance on the impact of mental illness

The *Mental Health and work: Impact, issues and good practices*<sup>24</sup> report prepared jointly by the World Health Organisation and International Labour Organisation in 2000 states that mental health issues are 5 of the 10 causes of disability worldwide, at the time of the report. The report states that even in 2000 (21 years ago), it was identified that 'mental illness imposes a heavy burden in terms of human suffering... and economic costs'.<sup>25</sup> Relevant to this submission and the impact taxpayer's mental illness can have on meeting their obligations, the Diagnostic and Statistical Manual of Mental Disorder fifth Edition (**DSM-V**) outlines the criteria for psychologists, psychiatrists and other specialised GPs to diagnose individuals suffering from a mental illness.

For example, some of the criteria for Major Depressive Disorder include<sup>26</sup> depressed mood, markedly diminished interest in all or almost all activities, fatigue or loss of energy every day, feelings of worthlessness, diminished ability to think or concentrate or indecisiveness, recurrent thoughts of death and suicidal ideation, symptoms cause clinically significant distress or impairment in social, occupation or other important areas of functioning.

Some of the criteria for Generalised Anxiety Disorder include<sup>27</sup> excessive anxiety and worry, difficulty controlling the worry, easily fatigued, difficulty concentrating, sleep disturbance, symptoms cause significant distress or impairment in social, occupation or other important areas of functioning.

Many of the substance-use disorders (alcohol-use, cannabis-use, hallucinogen-related use, inhalant-use, opioid-use, sedative/hypnotic-use, stimulant-use, other/unknown substance-use) have the following criteria in common:<sup>28</sup> recurrent use resulting in failure to fulfill major role obligations at work, school, or home, continued use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol and important social, occupational or recreational activities are given up or reduced because of use.

A common criterion of many of the mental illness we see has tax practitioners affecting our clients is that it impacts the sufferers' functioning in social, occupation other areas through significant distress or impairment, and failing to meet obligations.

### 2. Interaction of mental health issues and physical health issues

The Australian Institute of Health and Welfare ('AIHW') report '*Australia's health 2020*' reports that 'mental health and physical health are inextricably linked and people with mental illnesses are more likely to develop physical illness and tend to die earlier than the general population'.<sup>29</sup>

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<sup>24</sup> Accessed on 12 October 2021:

[https://ecommons.cornell.edu/bitstream/handle/1813/76479/no\\_49mhealth.pdf?sequence=1](https://ecommons.cornell.edu/bitstream/handle/1813/76479/no_49mhealth.pdf?sequence=1)

<sup>25</sup> Ibid pg 3

<sup>26</sup> DSM-V pg 160 - 164

<sup>27</sup> DSM-V pg 222 - 226

<sup>28</sup> DSM-V pg 490 - 578

<sup>29</sup> Australian Institute of Health and Welfare, *Physical health of people with mental illness*, accessed on 10 November 2021 at < <https://www.aihw.gov.au/reports/australias-health/physical-health-of-people-with-mental-illness>>



The report outlines evidence which ‘suggests that people with mental illness are more likely to develop physical illness due to a combination of lifestyle, socioeconomic and system-level factors such as social stigma, lack of health service integration, and a lack of clarity about who is responsible for physical health monitoring in people with mental illness’.<sup>30</sup>

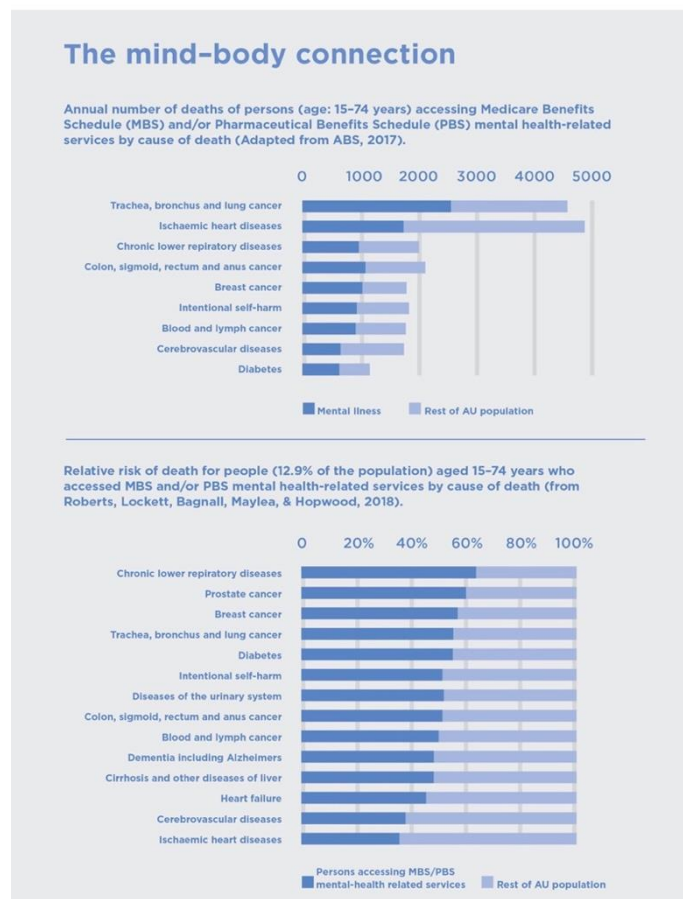
Common physical illnesses among people with mental illness in Australia (sourced from Australian Bureau of Statistics (‘ABS’) data from 2018) includes:

- Arthritis
- Asthma
- Back problems
- Cancer
- Chronic obstructive pulmonary disease
- Diabetes mellitus
- Heart, stroke and vascular disease
- Kidney disease, and
- Osteoporosis

Each of these chronic conditions were found to be more prevalent in people with mental illness than those without mental illness.

Professor Russel Roberts and Professor Jenny Bowman MAPS provided an article to the Australian Psychological Society (‘APS’) in *InPsych* 2019.<sup>31</sup> The article was written when the APS formally

committed to the ‘Equally Well National Consensus Statement’, and to making the physical health of people living with mental illness a priority. In the article, Roberts and Bowman provide summarised information regarding comorbidities that are higher in people suffering from mental health issues than those that are not.<sup>32</sup> The data was adapted from 2017 ABS data and a study conducted by Robert, Lockett, Bagnall, Maylea & Hopwood in 2018.<sup>33</sup>



<sup>30</sup> Ibid

<sup>31</sup> Russel Robert and Jenny Bowman, *Physical health of people with mental illness* (2019) *InPsych* 41(6), accessed on 10 November 2021 at < <https://psychology.org.au/for-members/publications/inpsych/2019/december/physical-health-of-people-with-mental-illness> >

<sup>32</sup> Ibid

<sup>33</sup> Roberts, R., Lockett, H., Bagnall, C., Maylea, C., & Hopwood, M. (2018). Improving the physical health of people living with mental illness in Australia and New Zealand. *Australian Journal of Rural Health*, 26(5), 354-362. doi:10.1111/ajr.12457

### **3. Interaction of mental and physical health issues and financial problems**

The Department of Health has a website called '*Head to Health*'.<sup>34</sup> The website provides information about the impact of mental health issues on financial problems. The website states 'mental health and financial safety are strongly linked. Experiencing a mental illness can add to financial stresses, and financial stresses can add to a mental illness.'

Government website, '*Health Direct*' provides information on how financial stress can impact a person's health. The website states:<sup>35</sup>

'Some signs that financial stress is affecting your health and relationships include arguing with the people closest to you about money, difficulty sleeping, feeling angry or fearful, mood swings, tiredness, muscle pain, loss of appetite, lower sex drive and withdrawing from others.

While these are normal reactions, they can affect your health if they continue for more than a few weeks. You could be at risk of developing anxiety or depression. Some people use drugs or alcohol to help them cope. Some have thoughts of self-harm or suicide.'

### **4. Cultural differences and stigma around mental health issues**

The Australian Human Rights Commission reports that Australia is home to people that identify with more than 270 ancestries.<sup>36</sup> The Australian Bureau of Statistics reported in 2013 that 1 in 4 Australians were born overseas, and 46% of Australians have at least one parent who was born overseas.<sup>37</sup> As a result, taxpayers may understand and acknowledge mental illness in different ways. Four ways that culture impacts mental illness includes cultural stigma, understanding of symptoms, community support and access to resources.

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<sup>34</sup> <https://www.headtohealth.gov.au/meaningful-life/feeling-safe-stable-and-secure/finances>

<sup>35</sup> <https://www.healthdirect.gov.au/financial-stress>

<sup>36</sup> <https://humanrights.gov.au/our-work/education/face-facts-cultural-diversity>

<sup>37</sup> <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features30April+2013>