



Law Council
OF AUSTRALIA

Business Law Section

Division Head
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600
Via email: beeps@treasury.gov.au
2016

15 July

Dear Sir or Madam,

Mandatory Disclosure

1. This paper is the response of the Taxation Committee of the Business Law Section of the Law Council of Australia ('Law Council') to the discussion paper released by the Australian Government in May 2016 in respect of the OECD proposals for mandatory disclosure of tax information.
2. The purpose of the paper is to set out the Law Council's views as to how the foreshadowed mandatory disclosure rules should be framed having regard to disclosure rules that are currently available to the Australian Taxation Office and to respond to the Government's preliminary views in relation to the OECD's key recommendations.
3. The starting point is the statement in the Final Report of Action Item 12 of the OECD's Base Erosion and Profit Shifting Project which is set out in paragraph 4 of the Discussion Paper.
4. At the outset we note that, whilst the mandatory disclosure rules of other countries may be informative, Australia's rules must be tailored for Australia's circumstances and in particular its other disclosure and anti-avoidance regimes. It is important to avoid duplication of and inconsistency with other legislation, as well as unnecessary compliance costs, especially on the vast

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majority of taxpayers who voluntarily comply with their taxation obligations and who are already burdened by substantial compliance costs. Australia's rules must also be designed not to infringe established civil rights such as confidentiality, legal privilege and the privilege against self-incrimination any more than is necessary or appropriate.

5. In particular:

5.1 any disclosure required to be made must not amount to an admission by the discloser that the arrangement is an *aggressive tax arrangement*, that it breaches any law or that it does not have the intended tax effect, and cannot be used as evidence to that effect in proceedings involving the discloser or any other person. In other words, any disclosure must be on a "without prejudice" basis;

5.2 there should be strict limits as to the use the ATO may make of the information¹;

5.3 disclosure should not be required of information previously comprehensively disclosed (Table 2, Issue 2). Such disclosure could be by way of an application for a private ruling (see Table 1). Whether a disclosure is comprehensive ought depend upon whether it enables the Commissioner to identify the particular aggressive tax arrangement or the participation of the taxpayer in such an arrangement.

6. Accepting that, as set out in paragraph 1 of the Discussion Paper, "*the purpose of mandatory disclosure rules is to require tax advisers to make early disclosure of aggressive tax arrangements (often before income tax returns are lodged) with the view to providing tax authorities with timely information on arrangements that have the potential to undermine the integrity of the income tax system*", the OECD's statement provides a convenient matrix to identify the essential elements of the rules. Whilst the Discussion Paper uses the term "tax adviser", the OECD's recommendations use the term "tax promoter". The Law Council is strongly of the view that any

¹ See for example sections 68 and 69 of the *Australian Securities and Investment Commission Act 2001* and section 30 of the *Australian Crimes Commission Act 2002*

broad mandatory disclosure regime must not impinge upon the normal activity of an adviser who advises a client on the application of the taxation law to a transaction, contemplated or entered into by a client, for a fee that is not based or calculated by reference to the tax outcome. Insofar as an obligation on a tax adviser is concerned, any mandatory disclosure regime should be limited to those who design aggressive tax arrangements that are clearly and precisely identified by the ATO to be marketed to taxpayers generally or those who are actively engaged in marketing them. This would more accurately mirror the OECD's recommendations in Action Item 12 of the BEPS Project.

7. As noted above, Australia's rules should not infringe established civil rights such as legal professional privilege and the privilege against self-incrimination.

Mandatory Disclosure Regimes should be clear and easy to understand

8. This element requires not only the key concepts of the regime (such as tax adviser, aggressive tax arrangements), to be clearly identified, but also the circumstances in which an obligation arises, the steps which need to be taken to discharge that obligation and the consequences which follow if that obligation is breached, to be clearly set out. The key concepts are:
 - 8.1 *aggressive tax arrangements*
 - 8.1.1 the taxes to which the rules relate need to be specified. Income tax and GST are obvious, but there may be doubt about levies such as the superannuation guarantee levy. In addition, the rules need to enable the ATO to use information obtained in relation to an aggressive tax arrangement relating to one tax, say income tax, to another tax, say GST;
 - 8.1.2 the Law Council supports the proposal that if the ATO seeks mandatory disclosure of a particular type of aggressive tax arrangement, it should have an obligation to identify the precise

characteristics or hallmarks of that type of arrangement in a document which would be published in much the same way as a Taxpayer Alert². Further, it should be considered whether the identification of the arrangement (or the characteristics or hallmarks/criteria of such an arrangement) could be outlined in a formal document which is capable of being challenged in a court by declaration or similar relief on the basis that the identified arrangement does not meet the characteristics or criteria;

- 8.1.3 since these are arrangements that “*have the potential to undermine the integrity of the income tax system*”, they should be limited to arrangements which may be availed of by taxpayers (or specific types of taxpayers such as financial institutions generally) and which are marketed to such taxpayers the cumulative effect of which is to undermine the integrity of the tax system. They ought not to include what might be regarded as an aggressive position taken by a given taxpayer in relation to particular circumstances in determining its own taxable income;
- 8.1.4 the hallmarks of an *aggressive tax arrangement* should be derived from features of *marketing* arrangements such as those the subject of the promoter penalty provisions contained in subdivision 290-B of Schedule 1 to the *Taxation Administration Act 1953 (the TAA)*;
- 8.1.5 as numerous cases dealing with the application of Part IVA have shown, what appears to the ATO to be a tax avoidance scheme to which that Part applies may well not be such a scheme. Whilst the range of potential arrangements justifies a wide concept of *aggressive tax arrangement*, its application should be tempered by carefully prescribed legislative criteria. An external review process (eg. one modelled on the General Anti-Avoidance Rules Panel, save that its decisions would be binding on the ATO) should be

² But, unlike a number of Taxation Alerts, would not include arrangements which were commercially legitimate where the primary purpose of the Alert was to indicate that there were legitimate differences of opinion (eg TA 2014/1 and TA 2009/11).

required and there should be provision for the review or appeal of the ATO's decision in relation to a particular arrangement³;

- 8.1.6 the Commissioner has from time to time changed his conclusions in relation to arrangements which he has previously accepted as having a particular tax effect (generally beneficial to the taxpayer). Examples include Taxation Ruling 2014/5 in relation to the application of section 109J to certain orders of the Family Court and *Macquarie Bank v Commissioner of Taxation*⁴. Consistently with his administrative practice set out in Practice Statement PS LA 2011/27, he should only require disclosure from those who enter into aggressive tax arrangements after the notice;
- 8.1.7 if the ATO determines that an arrangement is not an aggressive tax arrangement it should be compelled to retract any previous notice and publish the retraction in the same way that it published the previous notice;
- 8.1.8 there should be a voluntary disclosure mechanism regime similar to the private ruling regime, which would enable an adviser or taxpayer to obtain the ATO's ruling as to whether the particular arrangement was an aggressive tax arrangement and to obtain a review or appeal of an adverse decision.

8.2 *Tax Advisers*

- 8.2.1 the term is broad and vague and needs to be precisely defined so that it is clear to whom it is to apply and the circumstances in which it is to apply. At present it could include anybody who gave advice in relation to taxation, whether or not in relation to the efficacy of the particular aggressive tax arrangement, such as financial advisers who might refer to what might be, to them, accepted tax practice, as an incident of their general financial advice, tax agents who just prepare income tax returns as well as accountants and

³ There would probably need to be a special statutory regime to enable reviews or appeals to be expedited and for the hearing and the decision to remain confidential.

⁴ 2013 FCAFC 119.

lawyers who provide detailed advice (sometimes solely in relation to taxation issues but, frequently, in relation to taxation issues which may arise in the context of a much larger arrangement in respect of which they are advising generally). For the same reason that *aggressive tax arrangements* should be qualified by reference to those which are *marketed*, the identity of tax advisers should, as recommended by the OECD, be limited to those who are engaged in marketing such aggressive tax arrangements, such as under the promoter penalty provisions;

8.2.2 the degree of marketing ought to be material so as to exclude those persons who only play a minor role, such as an adviser who does no more than make their clients aware of the existence of an arrangement which the client may care to pursue (in particular where the adviser does not receive any payment for merely doing so);

8.2.3 if a tax adviser is to include a person who is involved in the development of aggressive tax arrangements, there should be exclusions for those who merely give advice as to the efficacy of such arrangements or who, as part of the service provided to the taxpayer, advise in relation to, or settle, documents prepared by a tax adviser.

8.3 *Disclosure*

8.3.1 if the obligation to disclose is to extend to taxpayers (as in the jurisdictions set out in Annex E to the OECD Report), the form and timing of the disclosure need to take into account the difference between their circumstances and those of a tax adviser marketing schemes more generally;

8.3.2 in this regard, to minimise compliance costs, mandatory disclosure should be limited to those taxpayers who have implemented the arrangement, should exclude legally privileged advice obtained by that taxpayer in respect of the arrangement and should not be required if the taxpayer has previously expressly disclosed the

- arrangement (for example in a previously filed tax return, by seeking a private ruling, lodging an objection or providing information to the ATO under Division 353 of the TAA);
- 8.3.3 similarly, compliance costs could be minimised by requiring the ATO to seek the identity of the taxpayer and not require the taxpayer to disclose unless its identity had not been disclosed by the tax adviser within say 90 days of a request to do so by the ATO;
- 8.3.4 the requirement of a taxpayer to disclose should not be extended to their advisers who fall within the ambit of paragraph 8.2.3 above;
- 8.3.5 the imposition of the obligation to disclose needs to be certain. That is, the *aggressive tax arrangement* needs to be clearly specified (outlining its essential characteristics). This should include both the tax elements of the arrangement and the marketing elements. We refer our comments at paragraph 8.1.2 above;
- 8.3.6 the obligation to disclose needs to be brought to the attention of the tax adviser or taxpayer. This could be done generally (eg. by a broadly published notice, published in much the same way as a Taxpayer Alert) and specifically (eg. where the ATO has information which suggests that a person may be a tax adviser or a taxpayer in relation to a particular arrangement). In the case of taxpayers it could form part of the information required to be included in its tax return for the year in which it first obtains a tax benefit from the arrangement;
- 8.3.7 where the obligation to disclose is imposed on a tax adviser or taxpayer, there needs to be a recognition that confidentiality and other obligations may be relevant. As outlined above, Australia's rules must also be designed not to infringe established civil rights such as confidentiality, legal privilege and the privilege against self-incrimination any more than is necessary or appropriate.

- 8.3.8 the time for disclosure needs to be both reasonable (having regard to the nature and extent of the information required) and certain but capable of extension in relation to all or part of the information required in appropriate circumstances;
- 8.3.9 the information to be disclosed (eg identity of taxpayers, standard documentation, supporting legal and other advices (subject to legal privilege)) needs to be certain. As numerous decisions in relation to the application of analogous provisions such as former section 264 of the *Income Tax Assessment Act 1936* have demonstrated, a requirement may be invalidated unless it is sufficiently certain;
- 8.3.10 the obligation to disclose, and any penalty for non-disclosure, should be imposed by the Court under a mechanism analogous to Subdivision A of Part III to the TAA (which, having regard to the purpose of the rules, could possibly be modified to enable the ATO to impose the requirement to disclose, but to allow the tax adviser to have the decision reviewed or set aside by the Court on appeal (in a manner analogous to departure prohibition orders under sections 14Q to 14ZA of the TAA));
- 8.3.11 the penalty for non-disclosure should reflect the degree of non-disclosure.

The mandatory disclosure regime should balance additional compliance costs to taxpayers with benefits obtained by the tax administration

9. See paragraphs 4, 8.1.3, 8.1.7, 8.2, and 8.3 above.

The mandatory disclosure regime should be effective in achieving their objectives

10. The effectiveness of the regime will depend on factors discussed in paragraph 5-7 above. Ultimately it will depend on the manner in which the rules are applied. Any delay in obtaining information due to review or appeal applications could be ameliorated by placing the onus on the person to have

a given notice set aside or declaration not to apply to it by the Court and provide for streamlined procedures (such as those which apply to injunctions under the promoter penalty provisions contained in subdivision 290-C of the TAA).

The mandatory disclosure regime should accurately identify the scheme to be disclosed.

11. See paragraph 8.1 above.

The mandatory disclosure regime should be flexible and dynamic enough to allow the tax administration to adjust the system to respond to new risks (or carve out of select risks).

12. See paragraph 8.1.4 above.

The mandatory disclosure regime should ensure that information collected is used effectively.

13. This is an administrative matter for the ATO.

Consultation questions

14. In response to the consultation questions raised in Part IV of the Discussion Paper the Law Council considers that:

14.1 any mandatory disclosure rules should not duplicate existing disclosure rules and should be targeted at those who market *aggressive tax arrangements*. To this end suitable features to be considered include:

14.1.1 adopting the definition of a *promoter* in section 290-60 of Schedule Part 4-25 to Schedule 1 of the TAA;

14.1.2 excluding information already disclosed;

14.1.3 only applying them to a taxpayer if they have entered into an aggressive tax arrangement (as distinct from merely having considered such an arrangement);

- 14.1.4 permitting such a taxpayer to make disclosure in its tax return;
- 14.1.5 excluding “tax advisers” who advise their clients in relation to a defined aggressive tax arrangement, but are not involved in its development or marketing;
- 14.2 the mandatory disclosure rules should apply to tax advisers who market aggressive tax arrangements and, only in limited circumstances, to taxpayers;
- 14.3 a broad discretion provided to the ATO in determining what arrangements are *aggressive tax arrangements* which would trigger the mandatory disclosure rules (or, more accurately, power) is justified if the nature of what constitutes such an arrangement is set out in legislation and if that discretion is tempered by provisions for internal and external review and appeal;
- 14.4 the hallmarks for identifying specific aggressive tax arrangements ought to be those which inevitably occur in the marketing of such arrangements and it would be preferable, in the case of general hallmarks⁵, for there to be more than one. For example, while confidentiality obligations imposed on the client may be an appropriate hallmark, confidentiality obligations imposed on the adviser would not be an appropriate hallmark because the law has long recognised that certain persons (such as lawyers, bankers, accountants and auditors) are under a duty of confidence not to disclose information unless required to do so by law. A more appropriate hallmark would be a lack of transparency – ie. the refusal of a person to disclose to a taxpayer or their advisers all the details of a particular arrangement, including any legal and other opinions that person relies on in support of the effectiveness of the arrangement. Similarly, whilst a premium fee might be indicative of an *aggressive tax arrangement*, it raises the question as to what is a premium fee and how is that to be distinguished from the fee charged by

⁵ Such as those used in the UK.

professional advisers in relation to the advice that they give in the course of their day to day practice. A more appropriate hallmark might be where the fee, or a proportion of the fee, is contingent on the scheme set up by the person charging for it being successful (which might be defined to be being accepted by the Commissioner or validated by the Court);

- 14.5 the obligation to disclose should be imposed on a taxpayer only if it took the purported tax benefit into account in calculating its taxable income in its tax return or, if no tax return is filed by the due date for lodgement, failing to renounce the scheme by that date;
- 14.6 the legislative guidelines on the type of information which should be required to be disclosed should distinguish between that required of tax advisers and that required to taxpayers and should be information which has not been or, is not already required to be, disclosed before the specified date;
- 14.7 the ATO should be able to determine when disclosure is required (subject to reasonableness) and 90 days may be a good guideline. The appropriate period for disclosure however will depend upon the identification of those who are required to disclose and the breadth of publication of that requirement and should be able to be extended;
- 14.8 after the tax advisers have complied with the rules any obligation on a taxpayer to disclose its participation in the arrangement should be limited to the return (including BAS) in which the taxpayer has claimed the tax benefit (or taken into account) any part of it and should not require the provision of further information unless requested by the ATO (which should be limited to information that it does not yet have). The other actions which the ATO may take such as the use of information for improvement of the risk assessment systems set out in Table 2 Issue 5 are appropriate providing that the taxpayer suffers no taxation detriment other than that which would follow from the cancellation of the particular tax benefit (which they could have reviewed or appealed);

- 14.9 if a tax adviser fails to comply, the appropriate penalty to be imposed by the court is a monetary penalty imposed as an administrative penalty, for example in accordance with Division 298 of the *TAA*;
- 14.10 in addition to the review mechanism outlined above, the mandatory disclosure rules should be reviewed annually to determine their effectiveness.

If you have any questions in relation to this paper, in the first instance please contact the Committee Chair, Adrian Varrasso, on 03-8608 2483 or via email: adrian.varrasso@minterellison.com

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Teresa Dyson', written in a cursive style.

Teresa Dyson, Chair
Business Law Section