



The registered business name of
Independent Contractors Australia
Incorporated Victoria No A0050004U
ABN: 54 403 453 626
www.selfemployedaustralia.com.au
PO Box 13103 Law Courts 8010 Vic

Commonwealth Treasury
taxdebtconsultation@treasury.gov.au

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**Submission: Treasury Exposure Draft Legislation
to Extend the power of the AAT to pause or modify ATO debt recovery action**

This submission is made in response to the [Treasury Exposure Draft Legislation to Extend the power of the AAT to pause or modify ATO debt recovery action](#). (Note: The draft legislation was released on 12 January 2022 during the peak summer holiday break and allowed only seven days for consultation.)

- 1. Self Employed Australia rejects and opposes** the draft legislation and calls on Treasury to entirely withdraw the draft legislation and start again from the beginning.

The draft legislation completely undercuts the clearly and plainly stated budget policy initiative announced in Parliament on 13 April 2021 by the Small Business Minister in the presence of the Treasurer.

The Small Business Minister stated:

“We are backing small business in over the ATO. No longer will the ATO be able to garnishee and takeaway while the dispute is in train ...”

[A recording of the Ministers statement in Parliament can be viewed here](#) (23 sec)

This stated budget initiative of the government would bring Australia into line with decades-long, disputed debt-collection laws in both the United Kingdom and the United States. In both of those jurisdictions the tax collection authorities—HMRC (UK) and IRS (USA)—cannot collect on an (alleged) tax debt until such time as all appeals have been exhausted and finalised. This is balanced with revenue protection mechanisms (see below).

2. Reasons for our objection

The reasons that the Treasury draft legislation subverts the government’s taxpayer protection policy is as follows:

1. The Treasury draft legislation would force a taxpayer to apply to the Administrative Appeals Tribunal to have tax collection of a disputed debt *paused*.

In comparison, the Minister's plain statement (above) *did not say* that a taxpayer could *apply* to have a debt under disputed *paused*. Rather the Minister stated that "No longer will the ATO be able to garnishee ... while the dispute is in train." The government's intent could not be plainer.

This budget initiative requires legislation that *prevents* the ATO from collecting a tax debt (with revenue protections) while the debt is in dispute and under appeal. This is the situation in both the UK and the USA.

2. The Treasury draft legislation further subverts the government's budget initiative by then requiring the AAT to reject a taxpayer's application on grounds that are open-ended, entirely favourable to, and subject to the unaccountable whims of, the Tax Commissioner.

The grounds for required rejection, as stated in the draft legislation, are that the taxpayer applicant *must prove* that a collection pause order:

- I. ... is unlikely to prejudice or unduly restrict the Commissioner's administration of a taxation law;
- II. is unlikely to undermine the objective or purpose of a taxation law or a provision of a taxation law, or the integrity of the taxation system as administered by the Commissioner;
- III. the application ... is not frivolous, vexatious, misconceived, lacking in substance or otherwise intended to impede the proper administration of a taxation law."

[See Draft Bill 14ZZH (3A) (b) (i)(ii)(iii)]

Each of these requirements sets a benchmark of proof that is effectively impossible for any taxpayer to demonstrate, as it would require a detailed knowledge of (a) the ATO's entire administrative procedures, (b) every conceivable tax law and how the ATO interpreted each law and (c) what the Commissioner might consider to be 'frivolous' and so on. That is, the task of even applying for a debt collection pause would be so onerous, expensive, complex and time-consuming as to render any application to not be worth the effort.

Further, in response to any application, the Commissioner would be in a position of being able to object on almost any grounds, whether the Commissioner's grounds were frivolous, vexatious, misconceived or lacking in substance and the taxpayer would be required to disprove the Commissioner's objections. That is, these provisions in the draft legislation would effectively predetermine the failure of any taxpayer application.

In summary, the draft legislation would not change the current situation where the Commissioner currently has dictatorial powers to collect on any debt it alleges—whether the 'debt' is supported by the facts or not. Remember, this is supposed to be a small business taxpayer rights and fairness measure initiated by the government. The draft legislation usurps that initiative.

The job of Treasury is to faithfully draft legislation that accurately reflects the government's policy intent. This was, for example, impressively achieved with the JobKeeper legislation. Conversely, we submit that this draft legislation undermines the government's policy intent and the process of democracy in Australia.

3 Protecting the revenue

Treasury has a legitimate concern when considering tax law that prevents the Tax Commissioner from collecting a debt that is in dispute and under appeal. That concern is to do with preventing taxpayers defrauding the tax system by shifting, hiding or otherwise structuring their affairs in order to prevent the Commissioner from accessing taxpayer funds if, or once, an appeal has been resolved in the Commissioner's favour.

This legitimate concern has long ago been addressed in both the UK and the USA. In both of those jurisdictions the tax authorities (HMRC and IRS) can apply to the courts for a *freeze* on a taxpayer's financial accounts and/or assets to secure an alleged debt pending a final appeal decision. In both jurisdictions the court-authorized, asset-freeze process is speedy.

We recommend that in drafting legislation that accurately expresses the government's policy intent to treat small business people fairly, Treasury include asset-freeze provisions similar to those in the UK and USA. This provides an appropriate balance between taxpayer rights and the protection of revenue from taxpayer fraud.

Any freeze order application by the ATO should be subject to a specified court process and only be for the amount of the alleged debt in dispute.

4 Re-drafted legislation

This current Exposure Draft Legislation should be completely abandoned and replaced with draft legislation that

- a) Prevents the Tax Commissioner from collecting on a tax debt that is in dispute and subject to appeal by the taxpayer, whether the appeal is within the ATO's internal processes or the AAT or the courts.
- b) Enables the Tax Commissioner to apply to the courts (not the AAT) for a freeze order on a taxpayer's accounts/assets where there is concern that a taxpayer may structure his or her affairs to avoid payment. Such freeze orders could not exceed the amount of the alleged tax debt.

An application for a freeze order should be subject to due process as follows:

- An application by the Tax Commissioner is to be made to the courts and served on the Respondent taxpayer (business or individual).
- The Applicant must set out the reasons and supporting evidence to clearly state the case.
- The Respondent may make submissions to the court opposing the application.
- The Court will set a date for directions and make orders for further submissions and set a hearing date.

Note: This recommended freeze order process is in part modelled on [garnishee applicant provisions applicable in NSW](#).