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Small Business Entities and Industry Concessions Unit
Treasury

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Consultation: Disclosure of Business Tax Debts

This submission from the Australian Privacy Foundation (The "APF") responds to the Treasury consultation on the disclosure of business tax debts.

General comments

APF is opposed to the proposed disclosure of business tax debts to credit reporting agencies. We consider that tax liability information is a private matter between the citizen or business and the Government (in this case the Australian Taxation Office). There are serious privacy considerations to be considered with the proposal to disclose tax debt to a credit reporting agency. While businesses may operate as a separate legal 'person', the tax affairs of many individuals are tied up in businesses, including especially sole traders such as tradespeople and small business, and small partnerships: together these may be a majority of all businesses. There is no evidence that the Government has considered these privacy issues, or related issues around harassment.

The Foundation believes the proposal as currently drafted is not procedurally fair or consistent with the model litigant obligations of the Government. There are insufficient protections for a business to correct an inaccurate or misleading listing. The instrument is also ambiguous on the meaning of an "agreed arrangement" or "being in contact".

This submission provides arguments on why the proposed legislative change should not proceed. We also, in the alternative, provide suggested amendments if the instrument does proceed.

The problems with the ATO disclosure of business tax debts to credit reporting agencies

There is no Privacy Impact Assessment (PIA)

The Government has failed to consider the privacy impact of the proposed change. Credit reporting by its very nature is a privacy-invasive action. The justification for the privacy invasion is

that credit providers need to share information in order to lend responsibly. That credit provider interests issue always needs to be balanced with the expectation people have of privacy when dealing with the Government.

A Privacy Impact Assessment is required before this declaration can be introduced. It is very disappointing that the ATO has overlooked this essential step in any process to breach taxpayer privacy. In our view, as the privacy impact is potentially serious, the Privacy Impact Assessment should be conducted independently and with open consultation of those whose privacy interests are affected, and be concluded before the final version of this proposal proceeds, so the factors revealed in the PIA can be used in consideration of whether or not to pass or amend the instrument.

There are several serious privacy risks that could flow from the disclosure of this information including:

1. The debt could be inaccurate or misleading (why this can happen is detailed below), so the business is at risk of being wrongly refused credit, and could fail
2. A director is refused personal credit because they become aware of the company tax debt
3. Information about the tax debt could be leaked to the media (as many credit providers can access this information, this leak is a real risk; and there is in Australia still no right to sue for breach of privacy, despite decades of recommendations, so the victim would have few if any remedies.)

These are only some of the risks, and a privacy impact assessment is needed to identify all of the main risks and to recommend mitigation strategies.

The privacy impact assessment must be conducted in accordance with the Office of the Australian Information Commissioner Guide to undertaking privacy impact assessments. We also contend that Privacy (Australian Government Agencies – Governance APP Code 2017 (section 12) makes a privacy impact assessment necessary as business debts may be individual debts (for example, a sole trader).

Recommendation

An open, independent Privacy Impact Assessment must be conducted prior to this instrument being finalised and introduced into Parliament.

Inadequate laws and difficulties accessing justice

Business credit providers who list on a credit reports are subject to a range of laws that the ATO is not subject to at all. Those laws are:

- Australian Securities and Investments Commission Act 2001
- Australian Consumer Law
- ACCC/ASIC Debt Collection Guideline (a guide to the debtor harassment provisions in the ACL and ASIC Act)

In addition, the credit reporting of business debts generally has very poor protection and is only governed by the Privacy Act 1988 (and not Part 3A which provides significant protections for individuals but not business).

Overall, the inaccurate listing on a credit report by the ATO will be difficult to challenge and correct because:

1. The Inspector-General of Taxation does not have the power to order the ATO to correct an inaccurate listing
2. The role of the Office of the Australian Information Commissioner is unclear but even if it could make a determination it is unlikely to do so as it discontinues investigation on the vast majority of complaints under section 42.

The expectation of privacy when dealing with the Government

Tax affairs are a private matter. People and business should have a reasonable expectation of privacy when dealing with the ATO. The ATO states in various places, including its website, that:

> "We respect your privacy and keep your information confidential."

An exception is where the law "allows us to disclose your information to others". An example given on the ATO website of that exception is the Government data-matching guidelines. Those guidelines were used for the Centrelink 'robodebt' program.[1] This data-matching exercise is currently being legally challenged by Victoria Legal Aid on the basis that the data-matching algorithms and analytic operations frequently cause incorrect assessments.

The proposed instrument to disclose business tax debts is yet another breach of that expectation of privacy. Constantly adding laws to enable a breach of privacy is not consistent with community expectations of privacy when dealing with the ATO, especially when there is no longer a reasonable basis to assume that the risk of IT and data breach can be excluded in the ever-longer and more complex web of disclosures. This endless incremental expansion in exceptions to what was initially a strong and credible privacy model erodes trust in the Government and its commitment to keep tax affairs confidential.

Recommendation

Breaking expectations of data privacy to give tax information to third parties is not consistent with community expectations. The ATO must keep taxpayer data confidential unless there is a court order.

The objective of the proposed legislation

The objective of the proposed instrument (according to the explanatory memorandum) seems to be to enable "credit reporting bureaus to prepare, update or issue creditworthiness reports." This means the intention is to benefit commercial credit providers who may consider providing credit to a business who the ATO claims owes more than $100,000 in tax debts. There is no stated

[1] See Legal Aid Victoria explanation of how Robo-debt works and the associated problems at http://www.legalaid.vic.gov.au/find-legal-answers/centrelink/get-help/get-help-with-centrelinks-robo-debts.

benefit for the ATO except to help credit providers providing business loans. It is unclear where the demand for this change from the business credit provider sector came from: this key contextual information is not disclosed. There is no discussion or substantiation of any possible problems they may claim to be encountering in the absence of this breach of privacy expectations. In short, there is no demonstrated need, and thus no basis for assessing the proportionality of the proposal: quantitative weighting factors such as what level of need, what level of claimed benefit, or whether any level of risk to those affected has been modelled are all absent from the rudimentary analysis.

The ATO is not a credit provider

The ATO is not a credit provider, it is a Government body. The ATO is not providing information to a credit reporting agency to provide credit, but to list a debt. Listing a debt when not participating in credit provision is not consistent with the purpose and role of credit reporting agencies, the credit reporting scheme or the principles of reciprocity.

ATO debts are only one type of debt to the Government

People and businesses often can have debts to the Government for a range of reasons. Some common examples are land tax, Centrelink debts and debts to the ATO. The proposal to only list one type of business debt sets a precedent for a range of other debts to be listed.

This sort of novel but unjustified donation of tax information to a commercial sector unrelated to tax matters is a potentially bad precedent: if this proposal is waved through, one could expect further future special pleading from other sectors claiming they have an unspecified and unexamined need for tax data, or indeed data from any number of other statutory government programs.

This point is raising a real concern about the expansion of this type of exception to other Government debts, and to all types of tax debts.

The appropriate approach is to avoid breaching expectations in the first instance, and prevent the creation of a precedent that will act as a 'honey pot', attracting other business sectors to seek other properly private information from other agencies.

Using listing as a threat and debt collection tool

This issue is also discussed below in proposed changes to the draft instrument.

The Government does not have to comply with the debtor harassment laws in Australia (as set out in the *Australian Consumer Law* and the ACCC/ASIC *Debt Collection Guideline*). The Government does have to be a model litigant.

Debt collectors around Australia often use the threat of a credit report listing to get people and businesses to pay a debt claimed. This threat is a very powerful and persuasive as people and businesses (rightly) believe that a listing on their credit report will severely limit their access to credit. They also quite rightly believe that it may be very difficult to remove the listing even if it is incorrect, and its impact may be unpredictable, disproportionate and long-lasting.

Using threats to collects debts is not consistent with being a model litigant, and should not be started in this way. (This obvious potential motivation on ATO's part is not acknowledged, explained or justified in the EM, so the supporting material is deficient in establishing the factors for and against the proposal. This is the sort of overlooked issue that a properly conducted, open independent PIA may examine.)

The exemption from debtor harassment laws for Government would need to be reconsidered if this proposal proceeds, with a view to applying all the obligations and restrictions applicable to other potential harassers conducting debt collection, and expanding remedies to ensure they apply in full to Government.

The threshold of $100,000

This threshold appears to be quite large, and this appears to be intended to mean that relatively few business taxpayers are affected. The Foundation does not believe this is sufficient reason to erode the privacy rights of the affected businesses. Without a privacy impact assessment, it is hard to ascertain the potential impacts of the proposed legislation.

We are aware that it is possible for a very small business to run up a tax debt of over $100,000. This can happen when, for example, there is serious illness for a sole trader or one of the partners in a small partnership, and the taxpayer business stops paying tax when they are dealing with a prolonged crisis. A listing on their business credit report could mean that rehabilitation following that crisis to keep their business running would be very difficult.

Summary

As outlined above, the disclosure of business debts may have serious impacts on the business taxpayer including difficulties correct an inaccurate listing and serious privacy impacts. The proposed instrument should not proceed.

The draft legislation

As stated above, the Foundation does not support the draft instrument. However, if the draft instrument does proceed, we believe that there are a number of serious problems with the instrument as currently drafted.

Problem 1 – Debtor harassment and threats

There is no protection in the proposed instrument, or in a charter or Code, from the ATO threatening businesses with a default listing to persuade them to pay a tax debt. It is quite inappropriate (and not fair) for the ATO to use a default listing with a credit reporting agency as a threat in debt collection. It is not consistent with being a model litigant, and an abuse of ATO and Government immunity from debtor harassment laws.

The Government should not be threatening and using aggressive behaviour with businesses (or people) to get payment of a debt. When collecting a business debt, the ATO is dealing with a person. That person (even if representing a business) must not be subject to threats and coercion even about the business tax debt.

The proposed instrument or a Code must be amended to specifically provide protection and guidance on this issue.

Recommendation

The ATO must not use a credit report listing as a threat or coercion to pay a debt claimed. The Privacy Code for the ATO must be updated to provide specific guidance and rules on this point.

Problem 2 – Notification of the listing

Businesses and people should be accorded basic procedural fairness. If the ATO is considering making a credit report listing, the business affected must be notified beforehand. The ATO website refers to a notification of 21 days.[2] The 21 day notice period also includes the right to seek an independent review.

The proposed instrument does not mention any of these rights.

In our view, a 21 day notice period is insufficient, and the notice period must be 30 days.

The notification must be in writing and also be used to tell businesses about their rights:

- To seek an independent review with the ATO;
- To dispute the listing if it is inaccurate and how to do this through the OAIC or Inspector-General; and
- Provide options to make an agreement to repay.

Recommendations

The instrument must require that the business is notified in writing at least 30 days before listing the business tax debt with a credit report agency. The instrument should specifically state that a listing cannot be made until the notice has been sent and the 30 days has elapsed.

The notice must also give information on the business' right to an independent review with the ATO, and how to dispute the listing. It should also provide details on making a repayment arrangement.

Problem 3 – Inspector-General of Taxation

The explanatory memorandum does not clarify the role of the Inspector-General of Taxation if there is a dispute about the accuracy of a credit report listing. Is it anticipated that disputes will go to the OAIC? It is very unclear how a business can get an inaccurate listing fixed, especially in view of the continued refusal of Government to act on the decades of recommendations by ALRC to enable Australians to pursue a breach of privacy by litigation.

[2] <https://www.ato.gov.au/About-ATO/Commitments-and-reporting/In-detail/Privacy-and-information-gathering/Transparency-of-tax-debt-measure/#Thedurationthattaxdebtswillremainvisible>

As a matter of fairness, it should be possible to get a binding order on the ATO to fix an inaccurate credit report listing without having to go to the expense, delay and uncertainty of Court. This should include an obligation on ATO to pursue and enforce necessary changes or deletions to the report.

Recommendation

Businesses must be able to fix inaccurate listings easily and at no cost. The Inspector-General of Taxation should be empowered to review and make a binding decision on an inaccurate credit report listing. If the OAIC is the only avenue for redress (apart from Court), the OAIC should be required to make a determination.

Problem 4 – Repayment arrangements

A significant problem facing all taxpayers is that the ATO is very short on detail or any obligation to make reasonable repayment arrangements. In this context the ATO is proposing to list a default on the credit report of a business that is at least 90 days overdue on a repayment. The only way to stop this is to complain to the Inspector-General of Taxation, or make an agreed repayment arrangement.

If the ATO is being unreasonable about making a repayment arrangement, the business debtor has very little they can do. Both individuals and small businesses should be entitled to an ATO that has an obligation (like other credit providers who are able to make reports affecting an entity's credit report) to make reasonable repayment arrangements. They should also be entitled to have unfair decisions reviewed.

We do not believe arguments about "moral hazard" when making repayment arrangements are sound. There is no "moral hazard" problem with a delay in collecting tax to ensure that the business does not have to face other serious consequences. Community expectations are actually the opposite: there is "moral hazard" in not being obliged to make reasonable repayment arrangements so the tax can be paid as soon as possible.

Recommendation

The ATO should be obligated to consider reasonable repayment arrangements prior to any consideration of communicating to a credit reporting agency, and should develop guidance on this point.

Problem 5 – How long will the debt be listed

There are no laws governing how long business debts are listed. At the moment, the credit reporting agencies keep defaults listed for business for the same timeframe as a personal debt. There is no requirement for these time limits to stay the same.

Business tax debtors should have certainty about how long any listing will remain on their credit report. The instrument should specifically cover this issue so debts do not remain on a credit report for an unfair length of time.

We recommend that the instrument, if it is to proceed, should require that business debt defaults are listed for a maximum of 5 years and then removed. If the debt is repaid in full or a repayment arrangement is agreed and the business is complying with that arrangement for 6 months, then the listing should be removed.

The ATO specifically states on its website that "if a business no longer meets the criteria to be reported to CRBs, we will instruct the CRBs to remove and no longer report (in any future credit reports) the tax debt information of the business."[3] If this is what is being undertaken then it is important that this is reflected in the legislation.

Recommendations

The instrument must provide certainty on how long a debt will be listed. We recommend a debt can only be listed for 5 years from the date of assessment. If the debt is repaid or a repayment arrangement is agreed (and complied with for 6 months) the listing must be removed.

If you have any questions please do not hesitate to contact Kat Lane.

Yours sincerely

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[3] See <https://www.ato.gov.au/About-ATO/Commitments-and-reporting/In-detail/Privacy-and-information-gathering/Transparency-of-tax-debt-measure/#Thedurationthattaxdebtswillremainvisible>