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Black Economy Division
The Treasury
Langton Crescent
PARKES ACT 2600

31 August 2017

DESIGNING A MODERN AUSTRALIAN BUSINESS NUMBER SYSTEM

Dear Mirren,

BDO welcomes the opportunity to provide feedback in response to Treasury's consultation paper 'Designing a modern Australian Business Number system' released on 20 July 2018 on strengthening and modernising the Australian Business Number (ABN) system (consultation paper). We note that this is a response to findings that participants in the black economy are using the ABN system to facilitate their fraudulent activity and a forum for recommending improvements to the ABN system which will better support ABN data for end users and underpin the growing use of ABNs across a wide range of purposes.

This BDO submission contains recommendations addressing every consultation question, including:

- a requirement that holders of ABNs be required to lodge an annual income tax return that includes disclosure of the ABN (recommendation #7)
- encouraged use of the ABN to assist with the tracking and record of financial transactions, rather than punishment of taxpayers who have done the right thing and obtained an ABN (recommendation #9)
- a requirement that online sales platforms clearly display the ABN of the business so customers can meet their legal responsibilities to ensure a valid ABN for payments over \$75 to avoid withholding tax (recommendation #10)
- application of penalties to an activity that constitutes a business or enterprise but does not obtain an ABN (recommendation #11)
- ATO education and compliance activities to ensure that all businesses and enterprises have an ABN linked to their income tax return (recommendation #17)

These and other issues are expanded upon in the attached appendix.

Should you wish to discuss these comments, please feel free to contact me on +61 2 9240 9736 or Lance.Cunningham@bdo.com.au.

Kind regards,



Lance Cunningham
BDO National Tax Director

Appendix

1. Are changes needed to the ABN system to take into account the expanded purposes for which ABNs are used today? If so, what changes?

The Consultation paper suggests that “an ABN has become a de facto ‘licence to do business’”. Holding an ABN is an absolute prerequisite to any commercial activity and a necessity for any business. For a payment by any person or entity where the payment is for any service other than for domestic personal use of an individual, the legislation requires the payer to have a document with a valid ABN for the payee or to withhold tax at the rate of the top marginal rate from that payment.

Failure to withhold when required to do so, leaves the payer liable to a penalty equivalent to the amount that should have been withheld even though the full amount was paid to the payee. The payer ends up with a cost of the service plus a non-deductible penalty of close to 50% of that cost.

Whilst there is a process that allows for those without an ABN to complete documentation as to why they do not need an ABN, as a matter of general practice, most businesses refuse to engage any goods or services with a person or entity that does not have an ABN.

In 2017 it was widely reported in the media that contractors were using the ABN of Bunnings rather than obtaining or presenting a valid ABN. We understand to intentionally present a document with someone else’s ABN is a criminal offence under section 23 of A New Tax System (Australian Business Number) Act 1999 (‘ABNA Act’) and punishable with imprisonment for two years. However, we are not aware of any such action being taken against perpetrators. We suggest that there needs to be firstly an education program to highlight this two years’ imprisonment penalty and secondly that if there is evidence that this practice is still being followed, that there be an enforcement program to identify perpetrators that can be successfully prosecuted to get the message across.

BDO is aware of clients in the construction / building industry who as a matter of policy check that the ABN on every invoice is a valid ABN consistent with the payee name on the invoice. Errors by the payees in providing documentation with an invalid / incorrect ABN for whatever reason are detected periodically. Payments are not made until complying documentation is provided or tax is withheld and remitted to the ATO.

Inappropriate review by the ATO

The ATO periodically reviews ABNs and seeks to cancel ABNs that the ATO considers are no longer in use. BDO have observed that the action taken by the ATO to cancel ABNs is sometimes on the basis that if the business section of the income tax return is not completed the ATO presumes that there is no activity that qualifies the continued holding of an ABN.

However, an ABN is required for various activities producing taxable income that are either not involved in ‘carrying on a business’ and which is disclosed in other parts of the income tax return or where there is no assessable income in relation to the activities, including:

- Rental of non-residential real estate;
- Rental of residential real estate that does not result in input taxed income;
- Hire of assets that does not constitute the carrying on of business;
- Sale of CGT assets held over from business activities where no ‘business income is received during the year.

BDO have also see instances of the ATO temporally cancelling ABNs for some large businesses for no apparent reason, which appear to be an apparent mistake by the ATO but questions the varsity of the processes being used by the ATO in the ABN Validation process.

Cost analysis

According to the consultation paper, holding an ABN is seen by some as sanctioning claims for a wider range of tax deductions, and contracting with ABN holders as being a lower cost option than employees

Prior to the introduction of the ABN system in 2000, similar anecdotal commentary existed relating to the deductions available when carrying on a business compared to employment and passive income sources. Therefore, this situation was not necessarily caused by the introduction of the ABN.

The allocation of an ABN to an enterprise is not what creates this commentary but rather uniformed views of what deductions are allowable against income. This is a broader education issue independent of the ABN system.

2. In your experience, is an ABN viewed as a sign of authenticity or legitimacy? If so, what impact does this have?

The holding of an ABN does not in itself legitimise a business or activity, but it is evidence that the business or activity is registered with the Australian Business Register (ABR). Without an ABN it can be difficult for a business or enterprise to receive payments.

Subsection 12-190(1) of Schedule 1 to the Tax Administration Act 1953 ('TAA') provides that:

An entity (the payer) must withhold an amount from a payment it makes to another entity if:

- a) the payment is for a supply that the other entity has made, or proposes to make, to the payer in the course or furtherance of an *enterprise *carried on in Australia by the other entity; and
- b) none of the exceptions in this section applies.

Subsections (2) to (6) set out the limited exceptions to the requirement to withhold. The primary exception is that the supplier has quoted their ABN to the payer on an invoice or some other document relating to the supply at or before the time of payment.

Our experience is that as a general rule, most businesses will not business to business transactions with entities or individuals that do not have an ABN. This approach is consistent with the intent of the law when it was established in 1999 and remains appropriate in 2018. Holding an ABN does not provide a message that the business or activity is compliant with all aspects of the law and nor should it.

This is no different to a car that has registration plates attached to the car - to the public this is evidence that the car is registered but it does not confirm that the car is always operated in a compliant manner. A car may have registration plates but the annual registration fees may not have been paid, or the car may be unroadworthy, subject to a financier's claims or similar. The Police and other authorities aim to detect cars that are non-compliant.

Similar to a person holding a driver's licence - the holding of a licence is also not evidence to the public at large that the manner in which an individual conducts their driving is fully compliant.

In both instances any compliance issues with the vehicle or the driver's licence are between those authorities responsible for the management of vehicles / licences on behalf of society and the owner / holder of the vehicle / licence. An unregistered vehicle is removed off the register.

For an ABN holder, all compliance issues should be between the holder of the ABN and the responsible authorities, the ATO and those managing the ABR.

3. Who should be entitled to an ABN? Who should not be entitled to an ABN? What are the risks or benefits from any changes to ABN entitlement rules?

Section 8 of the ABNA states the following:

You are entitled to have an Australian Business Number (*ABN) if:

- a. you are *carrying on an *enterprise in *Australia; or
- b. in the course or furtherance of carrying on an enterprise, you make *supplies that are *connected with the indirect tax zone.

The meaning of "enterprise" is in Section 9-20 of *A New Tax System (Goods and Service Tax) Act 1999* ('GSTA'), which provides various restrictions on who can obtain an ABN.

It appears these provisions are reasonably fit for purpose and BDO suggest they should not be changed too much unless there is an obvious need. However, we comment that the holding of an ABN should not be seen as being an entitlement. The ABN rules are a requirement for the payee to hold an ABN or the payer must withhold tax at the top marginal rate and report the payment to the ATO. The payee is entitled to receive the relevant payment because of the service or goods provided to the payer, not because of holding and quoting an ABN. The holding of an ABN stops the requirement for the payer to withhold, which allows the payee to receive the full payment to which they are entitled. i.e. the ABN rules can block an entitlement, it does not create any entitlements.

There are also some situations unrelated to tax that seem to inappropriately require an entity to obtain an ABN. For example, at present, in order to obtain a domain name registration, the owner of the domain name must have a valid ABN. Where the domain is for entirely personal use, this requirement to hold an ABN conflicts with the requirement that the holder of the ABN must be carrying on a business or enterprise.

If there are good reasons why every domain name must have a current ABN holder, it may be necessary that a person / entity can obtain an ABN solely to be able to apply for a domain name even though they are not carrying on an enterprise.

4. What is the best way of ensuring that only those who are entitled apply for and are granted an ABN?

When applying for an ABN, the current application system requires identification data including the tax file number of the entity applying and TFNs of associates (Partners, directors, trustees etc.). From a user perspective, this application system appears to apply a mixture of the new information on the application form with data that can be validated such as company registrations and tax file number data.

The application system appears to work appropriately. There may need to be an improvement in the process of updating ABN details however.

5. Should individual contractors holding ABNs be required to register for GST regardless of the amount of their annual turnover?

BDO respectfully suggest that to require all independent contractors to register for GST regardless of the amount of annual turnover penalises a particular structure, namely persons trading as individuals.

The GST threshold is in place to ensure marginal businesses that could be better described as hobbies are not included in the GST system. It also means such business that are in losses that would have more input credits to claim than the GST payments they make are not able to inappropriately obtain an advantage.

6. Could the ABN application process or ABR guidance material be made clearer to help applicants (and employers) distinguish between an employee and a contractor, or to better highlight the consequences if an applicant is caught intentionally ignoring the ABN entitlement rules?

We respectfully suggest that it is not the responsibility of the ABN system to manage the taxation issue of independent contractors who are more appropriately consider to be employees. This is a matter of interpretation of the taxation law and issues of employee v contractor and appears to be adequately covered by the current PAYG withholding rules that penalise employers for not withholding tax from payments to employees. The ATO appear to adequately enforce these rules as is evidenced by a number of recent court cases.

Any attempt to control this perceived risk by limiting access to obtaining an ABN will only result in penalising genuine arrangements. Those who would consider flouting the law may then move to operating without an ABN and outside the system.

7. Should an ABN holder be required to meet certain conditions or undertake certain obligations? If so, what obligations should apply? Should any exemptions apply and under what circumstances?

The TAA imposes strict requirements on payers to obtain ABNs on documentation or to withhold tax at the top marginal rate.

The supply of the service does not need to be made by an activity that meets the stricter definitions of a business; it is sufficient that the supply needs only to be through an enterprise

An enterprise is defined in section 9-20 of the GSTA. The definition is broad and includes an activity or activities, done:

- in the form of a business;
- in the form of an adventure or concern in the nature of trade;
- on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property

The activity needs only be in the “nature of trade” or the “form of a business”.

However, the definition excludes persons receiving payments that are subject to PAYG withholding as an employee, director, office holder or under a labour hire arrangement. This definition and restrictions appear to be appropriate and there does not appear to be the need for much change. People should be encouraged to obtain, and quote an ABN where appropriate.

BDO suggests that the one enhancement that may be appropriate is that all holders of ABNs be required to lodge an annual income tax return that includes disclosure of the ABN.

At present if a taxpayer derives income below the tax free threshold and is not registered for GST, they may not have to lodge Business Activity Statements and may not need to lodge income tax returns.

If all ABN holders were required to at least lodge an income tax return, then the tax return will provide the annual sign off of information for the ABN.

8. What consequences should apply if an ABN holder does not meet the required obligations (e.g. cancellation of an ABN, publication of a non-compliant status, penalties)? How could these consequences be designed to avoid unfair consequences for businesses?

The ABN is the equivalent an identification number that is universal across all entity types. From an ABN perspective, the required obligations should be limited to holding an ABN and appropriately displaying that number.

Compliance issues are associated with the ABN holder's taxation compliance record - this is subject to strict privacy rules and is between the ABN holder and the ATO.

If conditions are imposed on the holders of ABNs, a likely outcome will be people will cancel their ABN and ignore their taxation responsibilities.

There are adequate provisions now within the GST and income tax legislation to penalise those who fail to comply with their taxation obligations. They just need to be appropriately enforced.

Again, similar to the example of car registration and driver's licences, infringement notices and compliance issues are between the regulator and the owner / holder of the car / licence.

9. What notification should be given to an ABN holder of the ABR's intention to cancel their ABN?

Any consideration of the intention to cancel an ABN needs to be clearly communicated to the holder of the ABN. BDO has observed instances within the last year where the ATO has cancelled an ABN without proper investigation.

In one instance, the ATO decided to cancel an ABN with the first indication to the holder of the ABN of that intention being a letter sent to the taxpayer's tax agent advising that the ABN had been cancelled. Slower delivery times with Australia Post further delay this communication and this is compounded in regional areas.

In the above scenario, the letter stated that as the taxpayer was not carrying on business, they were not entitled to an ABN. In this particular instance, the taxpayer owned a commercial property that was leased to a third party tenant, the taxpayer was registered for GST, Business Activity Statements were lodged quarterly and were up to date, and the activity of the rental of the commercial property was disclosed in the Rental income section of the taxpayer's income tax return. After BDO as tax agent contacted the ATO, the taxpayer's ABN was reinstated.

It is important for many taxpayers to have an ABN as the legislation requires a payer to withhold tax at the top marginal rate from a payment of \$75 or more if there is no valid ABN (unless the payee meets one the small number of exclusions).

The ATO does not have access to the level of detail relating to a taxpayer's affairs to know the full circumstances of a taxpayer including examples such as a taxpayer has provided services to another entity, the taxpayer reports taxable income on a cash basis but the payer is yet to pay the taxpayer, so no income as yet appears in the taxpayer's income tax return;

The ATO should encourage the use of an ABN to assist with the tracking and record of financial transactions rather than punishing taxpayers who have done the right thing and obtained an ABN.

10. Are changes to the ABN system, or related systems and laws, needed to support easier verification of an ABN holder? For instance, this might include increased visibility of ABNs as part of business dealings or better linking ABNs to other systems (such as payment platforms).

Corporations Law requirements include the provision that every business document must disclose the Australian Company Number (ACN) or if the last nine digits of ACN are the same as the ABN, the ABN.

If an ABN is disclosed on a document, it is easy to search the ABR to validate that the ABN is valid and the information attached to the ABN is consistent. Businesses should be encouraged to check the ABN shown on documentation received.

The ATO could apply an education program focused on businesses regularly checking that the ABN provided by the supplier is valid. In addition, the ATO could undertake more tests that the ABNs disclosed on documentation are valid ABNs.

The ATO should not penalise the payer who has relied on the ABN but rather focus their activity on those who supply documentation with an incorrect, invalid or non-existent ABN.

Where there is evidence that the ABN being supplied is intentionally invalid, or is intentionally not the ABN of the supplier business, this is action is akin to misleading the ATO / Commonwealth; the intention may to allow the business to not to have to disclose all income, that is to defraud the Commonwealth.

It is also a criminal offence under section 23 of A New Tax System (Australian Business Number) Act 1999 ('ABNA Act'), punishable with imprisonment for 2 years. There should be more evidence of the ATO and/or Federal Police enforcement of this penalty

Online sales platforms should clearly display the ABN of the business so customers can meet their legal responsibilities to ensure a valid ABN for payments over \$75 to avoid withholding tax requirements.

11. Should specific action be taken to require ABN verification for (i) market stalls and food trucks and (ii) in order to access trade discounts?

The requirement for an ABN is making a supply in furtherance of an enterprise and therefore most market stalls are likely to meet this definition. A one off or irregular market stalls may sell products generated from a hobby, but it is more likely that the activity of a regular market stall is an enterprise.

Food trucks are a business activity and require health and licence registrations from local government, which are all features consistent with carrying on a business an adventure or concern in the nature of trade.

The ATO should be able to apply penalties to an activity that constitutes a business or enterprise but does not obtain an ABN. Similarly, if that business or enterprise does not comply with their income tax or GST responsibilities.

12. How could the quality of ABN data be improved?

The quality of ABN data could be improved with regular updates to the ABR through the income tax system.

13. As an end user of ABN data, what information on ABN holders is, or would be, most useful to you?

A search of the ABR can currently easily be conducted and is the starting point for most enquiries. BDO is satisfied that ABR extracts already identify key information without breaching privacy or allowing scamming. Therefore, the issue is whether the information on the ABN register is all accurate and up to date.

14. As an ABN holder, what information would you want to be publicly available on the ABR, noting that there are options to suppress information from being released publicly in certain circumstances?

The current balance of public information identifies key information including the entity type. For a company there is the link to the ASIC search function. A member of the public can pay a fee to ASIC to undertake a search to obtain the registered office of a company. Also a member of the public can access for free the ACNC database to undertake a search to obtain the registered office of a charity. There is no apparent comparable search facility for other types of entities such as individuals, partnerships, trusts.

To assist with integrity and transparency, it would be beneficial that there be an address that can be searched (for a fee) that would provide the equivalent of the registered office address for entities other than companies and charities.

For the regulators such as the ATO, if all ABN holders were required to lodge an annual income tax return that can link the ABN to the individual / entity, the regulator's details will remain more current.

15. Should ABN holders have to renew their ABNs? If so, how often? Should the same renewal period apply for all ABN holder entity types?

An ABN is the equivalent of a public tax file number allocated to an individual or an ACN allocated to a company. The ABN allocated to an individual or company is also unique to that particular individual or company. The ABN is not a licence to operate but rather a publicly available identification system.

It is appropriate for the ATO / ABR to review and manage the list of ABNs and supporting information. If the annual tax return requirement applies, there is a data source to update the ATO / ABR for deaths of individuals, wind up of entities, changes of address to maintain current information on the ABR.

- 16. What consequences should apply - and when - if an ABN holder does not renew their ABN on time? This could include late fees, a change in ABN status published on ABN Lookup, eventual suspension and/or cancellation.**

If a policy of automatic expiry of ABNs were to apply, there will need to be a process to communicate the renewal dates and details to the holder of the ABN.

To be effective, it would be necessary for the ATO to communicate with every customer of the business that any payment over \$75 requires tax to be withheld. This would mean that online sales platforms would need to be immediately shut down as the customer on such sites is unable to withhold the tax and complete the transaction.

If the ABN is cancelled by the ABR / ATO, what responsibility remains to the ABN holder for collecting GST, paying wages and reporting under Single Touch Payroll, payment of superannuation contributions for employees? The ABN of the payer is the key identifier for all of these taxation responsibilities. Cancelling the ABN could be seen as authorising that ABN holder that they no longer can or need to deal with their taxation responsibilities.

BDO have witnessed many instances where the ATO / ABR has incorrectly cancelled an ABN due to a lack of sufficient enquiry on the part of the ATO / ABR that cancellation is not an appropriate option.

- 17. Are ABN registration and renewal fees the most appropriate way to fund an ABN renewal process? Are there other options that should be considered?**

The ABN is a public identifier. Fees for registration and maintain an ABN should not apply. The administration costs will be greater than the income generated.

The ATO should undertake education and compliance activities to ensure that all businesses and enterprises have an ABN, that ABN is linked to their income tax return, and increased education and compliance activities payments to ensure all payments over \$75 to those who do not have an ABN have tax withheld.

These compliance activities will result in increased recognition of taxable incomes, increased identification of GST responsibilities, and income included in means tested government initiatives. These components will generate better income and savings to the government than a fee for maintaining an ABN.

- 18. If a fee is thought to be the most appropriate option, should the same registration and renewal fees apply for all ABN holder entity types? What ABN fee arrangements should apply to entities that are also subject to company or business name fees?**

No fees should apply to ABNs or to tax file numbers.