Australian Banking Association

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Proposed Legislative Instrument LI 2022/D15

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on the Australian Taxation Office (**ATO**)'s revised draft RCTI Legislative Instrument 2022/D15 (**Revised LI**) and the revised explanatory statement.

The ABA thanks the ATO for their engagement with industry to date and welcomes the changes in the Revised LI. Specifically, we acknowledge the removal of the need for Recipients to positively confirm the registration status of Suppliers.

The ABA has reviewed the Revised LI and would welcome the ATO's consideration of further matters as outlined in the annexure. These are:

- Proposed minimum governance standards.
- Aligning the Revised LI with the Act.
- ATO discretion on RCTIs.
- Amendments to the Explanatory Statement.
- Proposal for Multiple LI's.

We invite the ATO to continue to consider the annexure with respect to potential further changes to the Revised LI as well as the development of appropriate guidance.

If you would like to discuss further, please do not hesitate to contact

Kind regards

Head of Economic Policy

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

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ANNEXURE

1. Proposed minimum governance standards

The ABA understands that the ATO will expect Recipients to develop governance frameworks that ensure RCTIs issued will meet the requirements in the Revised LI. To provide certainty to industry, this expectation, and the requirements of any governance framework, may be outlined in a PCG.

In the ABA's view a governance framework that included the Recipient conducting periodic reviews on the registration status of Suppliers should be considered sufficient compliance with the Revised LI.

The ABA recommends that, under such a governance framework, a periodic check of a Supplier's registration status every 2 years should ensure compliance with the Revised LI. This proposal is made with the understanding that many Recipients will likely undertake these checks more frequently and that the ultimate timing of these checks should be determined on a case-by-case basis.

Further, to the extent possible the ABA encourages to the ATO allow for the integration of a RCTI governance framework, specifically periodic checks, with the existing justified trust framework.

Allowing for periodic checks will limit the compliance burden on Recipients while not allowing them to 'set and forget' with respect to the registration status of Suppliers.

2. Aligning LI wording to the Act

Relevantly in the Revised LI, section 7(3) now states, "*The recipient and the supplier of a taxable supply must be registered for GST when the RCTI is issued*". The ABA is concerned that this wording is inconsistent with the *A New Tax System (Goods and Services Tax) Act 1999* (the **Act**) in that it shifts the obligations of Suppliers onto Recipients. The following unpacks the issue.

The issue in detail

The Requirements under the Act

A Recipient is only entitled to input tax credits under Division 11 when that entity makes a creditable acquisition. A registered Recipient makes a 'creditable acquisition' when they acquire a 'taxable supply' for 'consideration', for a 'creditable purpose'[1]. A Supplier makes a 'taxable supply' when they make a 'supply' for 'consideration', and they are 'registered or required to be registered'[2]. A supplier may therefore make a 'taxable supply' whilst <u>not being registered</u> for GST if they are <u>required</u> to be registered.

Under the Revised LI section 7(3), a RCTI will be invalid if the supplier is not registered for GST at the time of issue. In circumstances where a supplier is required to be registered for GST (but is not registered) the supplier will be deemed to make a 'taxable supply' and be liable to account for GST on that supply, and the Recipient will make a 'creditable acquisition' and therefore should be entitled to an input credit on that acquisition, regardless of whether an RCTI would be technically invalid due to the supplier not being registered. The Supplier would have the liability to account for GST on that supply, and the Recipient of the supply makes a creditable acquisition of that supply. The existence (or not) of a valid RCTI affects the 'attribution' of any input tax credits available to the Recipient. That is, the recipient could pay the GST component, but be denied a credit.

Nothing in Division 29 of the GST Act, which deals with the attribution of GST liabilities and creditable acquisitions, limits these concepts to situations where the Supplier is 'registered' and not 'required to be registered'. Similarly, previous LIs on RCTIs relevant to our industry (notably RCTI 2017/12) do not include the 'registration' limitation.

[1] A New Tax System (Goods and Services Tax) ACT 1999, s 11.5.
[2] A New Tax System (Goods and Services Tax) ACT 1999, s s.9-5.

The impact of the Revised LI

The Revised LI will limit the validity of RCTIs to situation where the Supplier is registered for GST at the time of issue, while the GST legislation deems that a Supplier still makes a 'taxable supply', even if they are not registered, assuming that they are 'required to be registered'[3].

To illustrate this concern by way of example, a bank engages a broker and agrees to make payment (and issue RCTIs). The broker is making taxable supplies to the Bank above the GST threshold and the broker is required to be registered for GST and is registered for GST. The Bank is therefore making GST inclusive payments and issuing RCTIs which include the standard embedded statement (section 9 in the Revised LI) requiring the supplier to inform the recipient if the supplier ceases to be registered. These payments are 'creditable acquisitions' and the bank is entitled to input credits.

For unknown reasons the Broker erroneously deregisters for GST, and this deregistration is processed by the ATO. The Broker's income remains above the GST threshold and the Broker remains required to be registered for GST. As per the agreement with the Broker the Bank continues to make GST inclusive payments. Given the Broker is required to be registered for GST, under the Act, the Bank is still making valid 'creditable acquisitions' and is still entitled to input credits under the Act. It is still the Broker's responsibility to account for the GST payment. However, under the Revised LI the Bank's RCTIs are no longer valid and the Bank is no longer entitled to input credits due to the Broker not meeting their obligations under the Act.

ABA recommendation

We therefore recommend that section 7(3) of the Revised LI should be amended to state, "*The recipient and the supplier of a taxable supply must be registered **or required to be registered for GST** when the RCTI is issued*".

3. ATO Discretion on RCTIs

In our view, the ATO's current discretionary framework is incompatible with the Revised LI.

Under the s 29.70 (1B) of the Act, *"... the Commissioner may treat as a tax invoice a particular document that would not, apart from this subsection, be a tax invoice*." In s.29.70(3) of the Act it is stated '*A **recipient created tax invoice** is a tax invoice belonging to a class of tax invoices that the Commissioner has determined in writing may be issued by the recipient of a taxable supply'* (emphasis added). Linking s 29.70 (1B) and (3), we are of the view that an RCTI should be considered a tax invoice for the purposes of the Commissioner exercising the relevant discretion. The ATO's internal guidance for exercising this discretion in relation to tax invoices is set out in PSLA 2004/11 (the **PSLA**).

PSLA 2004/11

The PSLA is currently silent on the commissioner's discretion regarding RCTIs. Attachment A and B, to the PSLA, outline specific considerations required when exercising discretion. The PSLA should be amended to allow the commissioner to provide the ATO with discretion to 'treat as an RCTI a particular document that would not, apart from section 7(3) of the Revised LI, be a RCTI'. In the alternative, such a discretion specific to RCTIs could be included in the revised LI, and then reflected in the PSLA if necessary.

Under the section 7(3) of the Revised LI, an RCTI is automatically invalid on the basis of the deregistration status of the Supplier. Without clear allowances for discretion the Recipient will still essentially need to confirm the registration status of a supplier every time they issue an RCTI. This is the consequence of including a requirement for contemporaneous registration in the Revised LI, which has the effect of invalidating RCTIs where the supplier is not registered. Recipients need confidence that they can rely on RCTIs issued under an appropriate governance framework without needing to confirm registration every time an RCTIs is used.

[3] A New Tax System (Goods and Services Tax) ACT 1999, s.23-5 – 23-15.

The current PLSA does not protect Recipients who issues RCTIs to Suppliers on the reasonable understanding that the Supplier is registered only to discover, through periodic reviews, that the Supplier has deregistered.

Expansion of PSLA 2004/11

To avoid the above, the ABA recommends that ATO create a system where reasonable discretion can allow for RCTIs deemed invalid by this Revised LI on the basis that Recipients do all things reasonably necessary to confirm the registration of Suppliers, i.e. confirming on a periodic basis. The commissioner should be able to exercise discretion on accepting RCTIs deemed invalid by the Revised LI on the sole basis of the registration status.

This could be achieved either by amendments to PSLA 2004/11, or a discretion specific to RCTIs could be included in the revised LI, and then reflected in the PSLA if necessary.

At a minimum, appropriate discretion should ensure that Recipients do not receive any penalty or interest notices relating to RCTIs deemed invalid due to a Supplier deregistering without the knowledge of a Recipient. We ask that the ATO confirm that Recipients will not be penalised for the actions of the Suppliers.

The ABA accepts that any discretion exercised would be contingent on Recipients having adequate governance frameworks in place as per guidance issued by the ATO.

4. Amendments to the Explanatory Statement

In the ABA's view the proposed the Revised LI are significantly different to the wording in previous LIs, for example RCTI 2017/12. Therefore, we do not concur with the view of the ATO that the changes are 'minor and machinery'. The proposed LI changes will have a cost, including administrative, legal, process, and regulatory impacts.

The ABA requests that the extent of these changes be reflected in the wording at paragraph 19 of the Revised Explanatory Statement to a more level that more appropriately reflects the cost to industry.

5. Proposal for multiple Legislative Instruments

The ABA supports ATO's decision to consolidate the current 51 legislative instruments governing RCTIs.

However, the ABA is mindful of the multiple risk profiles, 'best practices', and governance processes across different industries utilising RCTIs. In the ABA's view there should be multiple RCTI-related LIs going forward. These may reflect different practical and risk profiles in different industries and allow the ATO to adequately address specific high-risk industries.

Noting the ATO's preference for a single LI, the ABA requests that the Revised LI identifies different practices for high-risk versus low-risk sectors and in the process, nominate banking as a low-risk sector. In addition, when issuing any guidance, the ATO should be cognisant of the different approaches required in different circumstances across different industries.