AFMA

24 April 2026

Director
International Tax Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: MNETaxIntegrity@treasury.gov.au

Dear Director

Strengthening the Foreign Resident Capital Gains Tax regime – Draft Legislation

The Australian Financial Markets Association (**AFMA**) represents the interests of over 130 participants in Australia's financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets, investors in renewable assets and industry service providers. AFMA's members are the major providers of wholesale banking and financial market services to Australian businesses and investors.

We are pleased to lodge a submission to the Exposure Draft legislation to implement the Government's policy in relation to the Foreign Capital Gains Tax regime (**the Exposure Draft**).

Executive Summary

AFMA notes the following by way of executive summary:

- We are concerned with the proposed retrospectivity of the amendments, particularly in relation to the changes to the definition of taxable Australian real property. These amendments should apply from the date of Royal Assent. To the extent that the Government insists on retrospectivity, then the earliest date that the amendments should apply from is May 2024;
- The concessional 15% rate for CGT events in relation to renewable energy assets should be available to domestic investors and extend well beyond the proposed 2030 deadline;
- The definition of "Australian Renewable Energy Asset" should align to the policy intent, as articulated in the draft Explanatory Memorandum, and be sufficiently flexible to cater for new and emerging technologies;

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- The exemption from withholding for on-market transactions should be extended to all transactions in respect of listed instruments given the other regulatory obligations that apply to such instruments;
- The proposed requirement for the purchaser to check the reasonableness of declarations should not apply to block trades;
- There should be an exemption from the proposed notification requirement for transactions undertaken for trading, hedging or regulatory purposes and the threshold for transactions in respect of listed securities should be $200 million;
- The proposed 365-day testing requirement should not apply to entities whose securities are listed on an approved securities exchange; and
- The proposed testing and notification obligations should apply prospectively with a lead time for commencement of eighteen-months from Royal Assent.

Retrospectivity

AFMA notes, with concern, the proposed application of the amendments in the Exposure Draft to 2006. Subject to the administration of the proposed amendments by the Australian Taxation Office (ATO), this would allow for retrospective changes to the taxation outcomes for non-resident investors for transactions that occurred more than two decades prior. In this regard, we note that non-resident investors will generally not have lodged income tax returns, meaning that there is no time limit on the technical ability for the ATO to assess taxation.

Stability of taxation settings and predictability of taxation outcomes are key to Australia being a destination for foreign investment. In AFMA's view, the retrospective application of the changes to the definition of "taxable Australian real property" to include things that are fixed or situated on land, is inappropriate for a jurisdiction aiming to attract foreign capital and should not occur, with any changes applying prospectively from the date of Royal Assent. On this point, AFMA does not agree with the Government's characterisation in the draft Explanatory Memorandum that the amendments are a clarification, but rather represent a distinct policy shift that should only have prospective application.

Retrospective legislation and amending the taxation outcomes that apply to commercial decisions after such decisions are made is inconsistent with regulatory best practice and may disincentivise future investment in Australia at a time when Australia is looking to attract foreign capital to assist Australia's commitment to the energy transition.

In the event that the Government does not determine to grandfather existing transactions, the legislation should reflect that any retrospectivity apply only to disposals after May 2024, being when the amendment to the Government's policy position was first announced.

Concessional CGT Rate for Renewable Energy

AFMA supports the proposed 15% concessional rate for CGT events in relation to renewable energy assets as this will continue to incentivise investment into assets that assist with the energy transition. However, AFMA's view is that there are two additional amendments that should be made in respect of the concessional rate:

- The concessional rate should be extended to domestic renewable energy investors so as to promote a level playing field and incentivise domestic investment into renewable assets; and
- The concession should extend beyond 2030 to reflect the long lead-times for renewable energy projects and prevent foreign investors from being incentivised to dispose of renewable energy assets when not commercially optimal to do so.

Inclusive Definition for Australian Renewable Energy Asset

AFMA's view is that there is misalignment between the policy intention and the technical definition of Australian Renewable Energy Asset, especially as it applies to battery energy storage systems and pumped hydro energy storage systems. The proposed definition only captures storage assets that store energy generated entirely from renewable sources. We do not think this reflects that electricity in the grid is a combination of electricity from renewable and non-renewable sources and that it is not possible to distinguish where electrons originated. We are concerned that this definition will unintentionally exclude storage assets that rely on grid electricity and think it should be clarified to reflect the policy intent of capturing all storage assets. It is also important that the definition is expansive and both reflects the policy intention of capturing all batteries and pumped hydro storage and is not proscriptive so as to not cater for future innovation and emerging technologies.

Withholding Obligation for Markets Transactions

AFMA has previously confirmed that the exemptions that currently exist from a withholding obligation will apply to any proposed notification requirement. This includes transactions that are covered by the exclusions in Section 14-215 of Schedule 1 to the *Taxation Administration Act 1953* or are in respect of a membership interest is not a non-portfolio interest. This is appropriate and will preserve the efficient operation of Australia's financial markets.

It is particularly noted that there are current exemptions from a withholding requirement for transactions on an approved stock exchange or those conducted using a crossing system, within the meaning of the Market Integrity Rules (Section 14-215(c)). The extension of these exemptions to the notification requirement is appreciated and AFMA notes that the crossing system exemption should apply to block trades that are notified through a crossing system as well as those conducted through such a system. AFMA reiterates its previous view that consideration should be given to a broad exemption for interests that are listed on an approved stock exchange given the potential interactions with other regulatory measures relating to notifications and disclosures such as market integrity rules, continuous disclosure obligations, substantial shareholder notifications and material non-public information requirements.

In addition, the Section 14-215 exemption for both withholding and reporting should be expanded to include transactions undertaken via special crossings or in an order book.

Checking Reasonableness for Markets Transactions

Block trades are usually undertaken quickly and have tight timeframes for execution. Generally, purchasers (or arrangers acting on behalf of purchasers) will accept the declaration from the seller or withhold in the absence of such a declaration. The onus for the purchaser to conduct due diligence to be reasonable satisfied that the declaration is not false adds significant complexity to a process where time is of the essence. As such, AFMA requests an exemption in relation to this requirement for block trades.

Proposed Notification Requirement

AFMA notes that the proposed amendments include a requirement to notify the Commissioner for all transactions undertaken by a non-resident with a value in excess of $50 million. This is regardless of whether the transaction is subject to CGT, including where the non-resident holds a non-portfolio interest in the underlying company.

Many of AFMA's members operate in a multitude of jurisdictions and may transfer shares from a non-resident entity to a resident entity for trading/hedging or regulatory purposes. Imposing a notification requirement to the Commissioner in such circumstances undermines the efficiency of Australia's financial markets. AFMA requests that the notification requirement include an exemption for transactions undertaken for trading, hedging or regulatory purposes. In addition, our view is that there should be an exemption for transactions undertaken by a member of a wholly-owned group that includes an ADI or AFSL holder.

In addition, our view is that the $50 million threshold is too low, in particular for listed securities, and should be $200 million for listed securities and $50 million for all other assets.

365 Day Testing Requirement

AFMA notes the proposal for the testing requirement to move from a "point in time" basis to a continuous basis. This proposal creates a number of practical issues for investors in listed entities, particularly in circumstances where the listed entities' financial accounts (which would be the principal source of information to assess the market value of the TARP asset) only record such assets at cost as opposed to market value. We also note that the policy intent towards moving to a continuous testing requirement is to "reduce the ability of entities to manipulate the asset composition of the interest in anticipation of a sale to avoid passing the PAT test at the point of sale," which we would argue is virtually impossible for a listed entity.

To this end, in relation to entities that are listed on an approved securities exchange, AFMA's view is that there should either be an exemption from the 365-day testing requirement or a requirement that such entities make disclosure as to whether disposals of shares would give rise to a CGT liability for a non-resident investor.

Commencement

Implementation of the requirements set out in the Exposure Draft for trading businesses will be onerous and costly to operationalise, particularly in relation to the proposed notification requirements. AFMA submits that, depending on the composition of the final requirements, an eighteen-month transition period from the date of Royal Assent would be warranted.

Inadequate Consultation Period

As shown by the considerable engagement in relation to the proposed amendments contained in the Exposure Draft, including public engagement, the proposed amendments are complex and impact a large number of stakeholders. In this regard, our view is that the two-week consultation period is patently inadequate and inconsistent with the Government's own consultation guidelines.

AFMA encourages the Government to implement the proposed reforms in an orderly and measured basis, including full consultation/engagement with stakeholders and potentially additional consultation on a revised Exposure Draft that incorporates stakeholder feedback. The recent experience with the Debt Deduction Creation Rules, the legislation for which was introduced into Parliament without being properly consulted on, has resulted in a number of unintended consequences and is not an experience that should be repeated in this instance.

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Thank you for the opportunity to provide a submission. Please contact me on (02) 9776 7996 or at rcolquhoun@afma.com.au to discuss any of the matters that we have raised in this submission.

Yours sincerely,

Rob Colquhoun
Head of Tax