



30 September 2016

Mr Daniel Smyth  
Project Manager  
New Measures and Government Relations  
Public Groups and International  
Australian Taxation Office

**Via Email:** daniel.smyth@ato.gov.au

Dear Daniel,

**Significant Global Entities Lodging General Purpose Financial Statements  
ATO Discussion Paper**

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

We welcome the opportunity to lodge a submission in respect of the ATO's consultation paper titled "Provision of general purpose financial statements by significant global entities" (**the Consultation Paper**).

**Scope of the AFMA response**

The scope of AFMA's response to the Consultation Paper focusses on the issues arising for those AFMA members that are headquartered outside of Australia, particularly those that operate in Australia through a permanent establishment as opposed to a separately Australian incorporated entity. The basis for this approach is an understanding that Australian headquartered AFMA members generally lodge general purpose financial statements with ASIC, pursuant to Part 2M.3 of the *Corporations Act* and accordingly should not be affected by the new measure. This reflects our view that there will be complete overlap between those entities that are within the definition of a "significant

global entity” and those that are within the accounting consolidated group. This view is based on the definition of “significant global entity” in Section 960-555 of the ITAA 1997 (particularly Subsection 960-555(2)). As such, where the Australian headquartered global parent entity lodges general purpose financial statements with ASIC, and this covers the accounting consolidated group, our view is that there should be no additional members that are within the definition of “significant global entity” for whom there is an obligation to lodge general purpose financial statements with the Commissioner.

As flagged with the ATO, AFMA will continue to liaise with its Australian headquartered members to identify any circumstances where an obligation to lodge general purpose financial statements with the Commissioner may arise and will look to engage further with the ATO should such an instance be identified.

## **1. Current reporting obligations**

### ***1.1. Section 601CK of the Corporations Act***

Many AFMA members, particularly those that conduct banking businesses as licensed Authorised Deposit-Taking Institutions (ADIs), operate in Australia through a permanent establishment, and are accordingly designated as foreign companies that may carry on business in Australia from a *Corporations Act* perspective. Relevantly, we understand that such entities fall outside the reporting requirements contained in Part 2M.3 of the *Corporations Act*. In this regard, we note there is no reference in Section 3CA that limits the ambit of the proposed measure to reporting entities that report under, or are otherwise covered by, Part 2M.3 of the *Corporations Act*.

Rather, Section 601CK of the *Corporations Act* provides that a foreign company that is registered to carry on business in Australia is required to lodge a copy of its balance sheet, its cash flow statement and its profit and loss statement, including copies “of such documents as the company is required to prepare by the law for the time being applicable to that company in its place of origin.” The remainder of the section confers upon ASIC the power to require the lodgement of additional financial statements, either in circumstances where the local obligations do not require the production of one or more of a balance sheet, cash flow statement or profit and loss statement, or where ASIC has the view that statements provided do not sufficiently disclose the company’s financial position.

It is noted that ASIC also has the discretion to exempt a foreign company from the Section 601CK requirements under sub-section 601CK(7). It is assumed for the purpose of our submission that this discretion has not been exercised.

It is clear that the reporting requirements for foreign companies that carry on a business in Australia are robust and allow ASIC to gain comfort that it has the appropriate financial information that adequately discloses the financial affairs of the company. This is reflected by the *ASIC Corporations (Foreign Licensees and ADIs) Instrument 2016/186*,

which removes the requirement for a foreign ADI that holds an Australian financial services licence from the requirements in Part 7.8 of the *Corporations Act* to keep financial records where it has complied with requirements that largely mirror those that are set out in Section 601CK.

### **1.2. APRA Reporting Requirements**

As requested by the ATO, we have set out below some commentary on the financial reporting obligations for ADIs to APRA. We note that these requirements do not appear to alter the requirements both in terms of the ASIC filing obligations nor, if applicable, the requirement to lodge general purpose financial statements with the Commissioner.

ADIs, including foreign ADIs, have significant lodgement obligations to APRA as a condition of being licensed in Australia, pursuant to the *Financial Sector (Collection of Data) Act*. This includes general financial information that would be expected to be disclosed on a statement of financial position (balance sheet) and statement of financial performance (profit and loss), but also more prudentially targeted information such as in relation to capital adequacy, liquidity and impairments. Importantly, these reports are prepared not in respect of the enterprise as a whole but rather in relation to the local (branch) operations. These reports are required to be the subject of an assurance review by an external auditor under APS 310.

The other crucial aspect to note in respect of these reports is that the information contained therein is confidential. This confidentiality is imposed by the *Australian Prudential Regulation Authority Act 1998 (the APRA Act)*. Specifically, Section 56(2) of the APRA Act provides that it is an offence for a person to disclose publicly information that is “protected information,” which is defined under Section 56(1) as including information provided in relation to a “financial sector entity,” which includes foreign bank branches. Section 57 of the APRA Act allows APRA, in respect of reporting documents, to make a determination by legislative instrument, that some or all of the reporting document contains, or does not contain confidential information. In the absence of such a legislative instrument, it is our view that the information disclosed in the reports provided to APRA cannot be made publicly available, either through the Commissioner or otherwise, absent a determination from APRA permitting such disclosure.

### **1.3. Global definition of “general purpose financial statement”**

In considering the current reporting requirements for foreign companies that carry on business in Australia, in light of any potential requirements to lodge statements with the Commissioner, it is appropriate to consider the international ubiquity of the term “general purpose financial statement.”

The term “general purpose financial statement” is defined in both Australian and International Accounting Standards as being financial statements that are intended to meet the needs of users who are not in a position to require an entity to tailor its reports.

However, the term does not appear to be defined, either with sufficient specificity or consistency, under US GAAP. Rather, the most closely analogous term under US GAAP is financial statements that are prepared in accordance with accounting principles generally accepted in the United States. Hence, to the extent that the accounts of the enterprise are prepared in accordance with US GAAP, it may be difficult to determine whether what is lodged with ASIC is a “general purpose financial statement.”

In this regard, we support the ability of an appropriately qualified person, such as the auditor appointed by the enterprise in respect of its local operations, to be able to provide an attestation or other confirmation that statements are general purpose financial statements.

### ***AFMA view***

Our view is that, given the structure of Section 601CK, the ability for ASIC to request additional information to supplement any disparities between the Australian accounting principles and those adopted in the local jurisdiction and the fact that foreign companies that carry on business in Australia do not have a reporting obligation under Part 2M.3 of the *Corporations Act*, adherence to the Section 601CK requirements should be acknowledged as the entity having provided to ASIC a general purpose financial statement. Adopting such a view would mean that there would be no further requirement for such entities to provide information to ASIC as the requirements in Section 3CA(1)(c) will not be met.

## **2. Adherence to local accounting standards**

To the extent that AFMA members were to have an obligation to lodge general purpose financial statements with the Commissioner, the Consultation Paper acknowledges the different views as to whether the general purpose financial statements need to be prepared in relation to generally accepted accounting principles or in relation to the Australian accounting standards. Our clear view from both a technical and policy perspective is that the statements be prepared in accordance with generally accepted accounting principles.

From a technical perspective, Section 3CA(5) provides that the statement must be prepared in accordance with:

- “(i) the accounting principles; or
- (ii) if accounting principles do not apply to the entity – commercially accepted accounting principles relating to accounting.”

The term “accounting principles” is defined in Section 995-1 of the ITAA 1997 as referring to “accounting standards,” which is in turn defined in the *Corporations Act* as being the accounting standards prepared by the AASB. Hence, only those entities that prepare reports with reference to the Australian accounting standards would be those entities to

whom the accounting principles apply. As such, any entity that does not apply the Australian accounting standards will be within subsection (ii). As such, the entities should be able to prepare the reports in accordance with commercially accepted accounting principles, such as those that apply in the home country.

From a policy perspective, while we note that there is no clear articulation of the policy intention of the specific measure due to the lack of an accompanying Explanatory Memorandum dealing with the measure, the imposition of the requirement to retranslate effectively the affairs of the global operation into the Australian accounting standards, or where there is no difference, establish to an acceptable standard that this is the case, are entirely disproportionate to any benefit that may arise and completely at odds with the Government's stated deregulation agenda. Feedback from global institutions that are AFMA members, particularly those that prepare home country reports in US GAAP, is that any requirement to retranslate into Australian accounting standards would impose such a compliance burden so as to result in them ceasing operations in Australia.

We are therefore of the view that there are sound bases to allow for the provision to the Commissioner of general purpose financial statements that are prepared in respect of the global parent entity or the head office entity in accordance with home country requirements, i.e. we support the second view in paragraph 17 of the Consultation paper. This is particularly relevant for locally-incorporated subsidiaries of global groups that currently do not lodge general purpose financial statements with ASIC and will remove any requirement to retranslate the accounts to be lodged with the Commissioner to comply with Australian accounting standards.

### **3. Entities operating through both a branch and subsidiaries**

Finally, and as previously raised with the ATO, many AFMA members that conduct ADI businesses may operate through both a branch and also locally incorporated subsidiaries in Australia. This structure may be driven by regulation, such as the restriction against foreign bank branches conducting retail banking business. In such circumstances, from a tax perspective, the branch is unable to consolidate with the locally incorporated subsidiary/subsidiaries and hence there will be two "corporate tax entities" for the purpose of Section 3CA. Accordingly, each corporate tax entity will need to determine whether a general purpose financial statement has been lodged with ASIC that covers its operations.

Noting the comments above in respect of the branch and the requirements under Section 601CK, it would appear that any requirements for the corporate tax entity to lodge general purpose financial statements with the Commissioner may be satisfied through the lodgement of the head office financial statements or those of the ultimate parent – refer to Section 3CA(5)(b).

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AFMA appreciates the opportunity to engage with the ATO on the Consultation Paper and is keen to maintain dialogue as the scope of the measure is refined.

Please contact me if you would like to discuss further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Colquhoun', written in a cursive style.

Rob Colquhoun  
Director, Policy