2 February 2016

The Board of Taxation
C/- The Treasury
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Via email: taxtransparency@taxboard.gov.au

Dear Board,

Voluntary Tax Transparency Code

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 are pleased to make a submission to the Board's Discussion Paper (**the Discussion Paper**) regarding the potential adoption of a Voluntary Tax Transparency Code (**TTC**). Our submission follows the comments made in consultation with the Board in a meeting on 14 August 2015.

Compliance burden

Many of AFMA's members are part of multinational enterprises/groups that have operations in a large number of jurisdictions globally and would be characterised as "large" based on the metrics included in the Discussion Paper i.e. Australian based turnover of in excess of $500 million. In this regard, it is noted that many AFMA members conduct banking businesses, which are generally characterised by high-volume, low-margin business models. From an industry perspective there will be a larger proportion of AFMA members included in the population of entities adhering to the TTC than in other industries. This point is exacerbated by the inability for branches to join a tax consolidated group with Australian members of the same wholly-owned group, such that transactions between such members and branches will not be eliminated and will be counted towards the revenue threshold, notwithstanding their lack of economic impact.

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For those global entities, the extent of the Australian operations relative to global size may be considered *de minimis*. Taking Australia's proportion of global GDP as a proxy, it may be reasonable to suggest that for some AFMA members the Australian operations comprise approximately 1% of global operations. Many AFMA members are headquartered outside of Australia and the local operations, including the local taxation and finance functions, may have limited or no access to global internal information.

Accordingly, in framing the requirements and implementation timeframes for the TTC, AFMA submits that the Board should ensure that any requirements to report information are targeted, to the extent possible, to the Australian operations and are consistent with global initiatives.

International consistency

The Discussion Paper rightly points to other transparency initiatives being undertaken or contemplated, specifically those in the United Kingdom and the broader European Union.

In the European Union context, the commitment thus far is for the Commission to "examine the feasibility of new transparency requirements for companies, such as the public disclosure of certain tax information by multinationals." There is no additional elaboration as to what this "certain tax information" may be and no suggestion, as far as AFMA is aware, that the initiative will require the disclosure of information outside the European Union.

In the United Kingdom context, as noted in the Discussion Paper, the Summer 2015 Budget announced three initiatives, namely a voluntary Code of Practice, the publication of the company's tax strategy and "special measures" for those companies considered to pose a high risk of aggressive behaviour. HMRC then released a Consultation Paper titled "Improving Large Business Tax Compliance" (**the Consultation Paper**) seeking feedback on the implementation of the initiatives. The "Summary of Response" to the Consultation Paper, released on 9 December 2015, noted the following in respect of the publication of tax strategy:

- In terms of the tax strategy of the organisation, multinational groups may have different governance structures in different parts of their overall organisation, and the "policy objective is transparency of the tax strategy that applies to the UK;"

- The published tax strategy will be flexible, principles-based and focus on risk management and governance arrangements in relation to UK taxation; and

- The disclosure of factual information should be resisted on the basis that it is commercially sensitive.

Further, and importantly, in relation to the proposed Code of Practice on Taxation for Large Business, the effect of the code is for signatories to commit to abide by a certain standard of behaviour, including fostering an open relationship with HMRC. Adherence

to the Code is not proposed to require the publication of tax information, particularly not tax information that is not related to the United Kingdom tax position.

Therefore, it appears that at this stage neither the European Union nor the United Kingdom will be embarking on a path to require companies that operate in their jurisdictions to publish quantitative taxation information relevant to other jurisdictions. It is AFMA's submission, therefore, that for inbound multinational enterprises that are to be subject to the TTC, the Board's recommendations acknowledge the burdens associated with providing global tax information, such as the proposal for the disclosure of a global effective tax rate, and also promote, to the extent possible, consistency with global developments. This may include consistency with the UK in terms of the matters disclosed in the "tax strategy" section of the 'taxes paid' report.

In terms of adherence to the OECD's BEPS Action Plan, AFMA has long supported the plan and Australia's role in ensuring that our taxation system is consistent with the developing global framework. However, we note that the BEPS transparency initiatives are focussed towards the sharing of information across revenue authorities as opposed to publicly.

Prudential regulation and confidentiality

As noted above, a number of AFMA members are Approved Deposit-Taking Institutions (**ADIs**) and are therefore subject to prudential regulation, both by APRA and its counterparts globally.

Generally, foreign ADIs that operate businesses in Australia at or through a branch provide detailed financial and other information to APRA on a regular basis and are largely exempted from reporting requirements under the *Corporations Act*. Specifically, under ASIC Class Order 03/823, a foreign bank branch is exempted from the requirements set out in Section 989B of the *Corporations Act* to provide ASIC with a balance sheet and profit and loss statement on an annual basis. There is a requirement that the enterprise lodge equivalent reports annually, but such reports detail consolidated global operations and not merely information referable to the Australian operations.

As such, foreign bank branches will not prepare and make publicly available any financial statements, let alone general purpose financial statements. Hence, based on the comments at Section 9.1 of the Discussion Paper, it will be necessary that the accounting information will be disclosed in the 'taxes paid' report.

The information disclosed to APRA by foreign bank branches remains confidential and is not able to be made publicly available, either on request or more generally. 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," of which foreign bank branches will be included. Section 57 of the APRA Act allows, in respect of reporting documents, APRA to make a determination by legislative instrument, that some or all of the reporting document contains, or does not contain

confidential information. Such a determination was recently made in 2015 (determination No. 17 of 2015) and that determination specified that information of a sensitive nature was to remain confidential, and this included total income tax liability.

Hence, to the extent that the 'taxes paid' report imposes on foreign bank branches (and other entities subject to prudential regulation) a requirement to publicly disclose accounting information, this may conflict with the existing prudential regulatory framework and constitute an offence under the APRA Act. AFMA's view is that any prudential regulatory confidentiality would take precedence and hence the TTC needs to be formulated in a manner consistent with existing and potential prohibitions and restrictions.

MEC groups

The Discussion Paper suggests that where there is a foreign multinational business operating in Australia, then all of the operations will belong within the same accounting consolidated group and hence there will be one disclosure. In the case of Multiple Entry Consolidated (**MEC**) Groups, i.e. where there are multiple entry points into Australia, there may be separate accounting groups, with the potential for the discrete businesses to operate independently. Where such independent businesses are all considered "large," then there may be duplication of compliance costs where each particular stream needs to make separate disclosures, with the quantitative disclosures not matching the information released by the Commissioner which is on a MEC group inclusive basis.

Accordingly, further clarity needs to be provided with respect to MEC groups, and how the TTC will apply to such groups.

Non-disclosure of losses

AFMA notes that one of the proposed quantitative disclosures in the 'taxes paid' report includes the disclosure of corporate income tax. To the extent that an entity has carried forward tax losses that are recouped for a particular income year, the corporate tax amount may be zero. We have assumed, but seek clarity, that consistent with the disclosures made by the Commissioner of Taxation as to tax payable by large enterprises, there will not be any disclosure as to the quantum of carried forward losses made in the TTC.

Commencement

Section 10.4 of the Discussion Paper suggests that "the TTC should be in operation in time for the reporting period for 2015-16 financial statements or annual reports." This seems to assume that all disclosing entities are 30 June balancers for accounting and tax purposes. Many AFMA members balance on a 31 December year end and, for tax purposes at least, this is in lieu of the subsequent 30 June (i.e. they are early balancers for tax purposes). The commencement period for such entities to adopt the TTC is unclear. Given the number of outstanding issues for inbound foreign entities that are subject to

the disclosure requirements, AFMA submits that such adoption should not be any earlier than for 30 June balancers.

Further, given the Board is not scheduled to produce its final report on the TTC until May 2016, the proposed timeframe appears optimistic, depending on the particular information that the Board ultimately recommends be disclosed in the TTC. In this case, our view is that it would be appropriate for the TTC to be optional for the 2015/16 year, allowing for early adoption by those entities for which compliance is possible, and then compulsory for the 2016/17 reporting year.

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AFMA appreciates the opportunity to make a submission to the Discussion Paper and would welcome engagement on any of the issues raised above. Please contact the writer with any queries.

Yours sincerely,

Rob Colquhoun
Director, Policy