7 July 2015

General Manager
Law Design Practice
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: taxlawdesign@treasury.gov.au

Attention: Jessica Mohr/Phil Bignell

Dear Jessica, Phil,

Extending GST to Digital Products and Other Services Imported By Consumers

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. In particular, our membership comprises institutions that may include entities that provide services to Australian consumers from outside Australia.

In this light, we are pleased to provide a submission to Treasury regarding the Exposure Draft and draft Explanatory Memorandum titled *Tax Laws Amendment (Tax Integrity: GST and Digital Products) Bill* 2015 (**the Bill**).

Broad ambit of proposed measures

While the policy objectives of the proposed measures were stated, as per the 2015-16 Budget Papers to apply to the importation of digital products and services, it is apparent that the scope of the proposed measures is significantly broader and may potentially crystallise a GST liability in respect of all taxable services provided to Australian consumers from offshore.

The consequence of this is that the universe of potentially affected suppliers has increased markedly and a significantly wider range of suppliers will need to ascertain both the GST treatment of the supplies they undertake and also the residency of the customers to whom they make supplies. As elaborated on below, this may impose considerable practical difficulties and exacerbate compliance costs without materially enhancing

Australian Financial Markets Association
ABN 69 793 968 987
Level 3, Plaza Building, 95 Pitt Street GPO Box 3655 Sydney NSW 2001
Tel: +612 9776 7955 Fax: +61 2 9776 4488
Email: info@afma.com.au Web: www.afma.com.au

revenue. This issue is particularly apparent in the financial services sector, where the provision of supplies which are taxable for GST purposes may be limited, but the definition of “financial supply” does not align with other jurisdictions.

Taxable supplies in the financial services sector

AFMA notes the mechanism adopted in the proposed legislation to ensure that supplies of services to Australian consumers are within the GST net is to add an additional component to Section 9-25, which deals with supplies of anything other than goods or real property, to include all such supplies to Australian consumers.

Based on our understanding, this legislative construction preserves the characterisation of supplies as either GST-free (under Division 38) or input-taxed (under Division 40) so that such supplies to Australian consumers are not caught within the proposed amendments. However, there are a number of services provided by financial services participants that are currently characterised as taxable and would be caught under the proposed amendments. These include:

- Brokerage services (in very limited circumstances);
- Access to online banking and trading platforms;
- Consulting services;
- Arranging services; and
- Custody and settlement services.

To the extent that these services are provided by non-resident suppliers to Australian consumers, they are generally not provided through an electronic distribution service and accordingly the proposed amendments in Subdivision 84-B, which will act to deem to the distribution service as having made the supply, will not apply.

Identification and registration requirements

Noting the potential for AFMA members that operate globally to potentially provide taxable supplies to Australian consumers, our principal concern relates to the obligations that may arise where identification of the residence of a consumer may not be practically undertaken at the time that the taxable transaction is made.

A compelling example of our concern arises in the context of brokerage. As set out in GSTD 2015/1, the supply of brokerage services in respect of a security or other financial product listed on an overseas exchange is treated as GST-free. Hence, to the extent that a broker provides such services to an Australian consumer, there should be no application of the proposed amendments to render the services as subject to GST.

Generally, an offshore broker providing services to an Australian consumer will be providing such services in respect of offshore underlyings; for regulatory and efficiency purposes it is generally the case that the location of the broker will be the same as the location of the exchange on which the transactions are effected. Hence, the vast majority, and indeed perhaps all, of the services provided by non-resident brokers to Australian consumers will not be caught by the proposed amendments.

However, given the absence of a regulatory or other fetter precluding the provision of brokerage services that may be taxable, such as unlisted Australian underlyings, then there would appear to be a *prima facie* obligation on the provider of the services to undertake efforts to identify the Australian consumers.

Noting the comments at paragraphs 1.36 and 1.37 of the draft Explanatory Memorandum, AFMA is concerned by the impracticality associated with ascertaining the status of the recipient of a supply at the time that is considered to be taxable. The only possible opportunity for providers of brokerage services to ascertain the intention of the clients with respect to the transactions undertaken by the clients is at the commencement of the relationship between the broker and the client, i.e. at the on-boarding stage. Given light-touch brokerage models are becoming increasingly prevalent, the broker will have little to no visibility in respect of the transactions undertaken by the client in advance of them being undertaken, in order to determine whether they may be taxable. Accordingly, our concern is that operationally the only way to address the "reasonable belief of Australian consumer status" requirement is for all clients to be so assessed at the on-boarding stage. This would impose administrative costs on foreign brokers that would be vastly in excess of any benefits given the expectation that such brokers would generally be making GST-free supplies.

Similarly, we note the potential for banks to provide access to online banking platforms and trading platforms to Australian residents, which may be caught under the proposed amendments, which also may necessitate the ascertainment of the residence of all customers across all products at the on-boarding stage, given the potential for such customers to, at a point in the future, pay fees that are subject to GST.

Accordingly, we are seeking to engage with Treasury and the ATO further to ascertain what "reasonable steps" may mean in this context. In particular, we are interested in better understanding the ability for banks and other service-providers to rely on their AML/KYC processes in discharging the "reasonable steps" requirement.

Change of residence

Noting the comments above in relation to services which may be taxable under the proposed amendments and our comment that the on-boarding stage is the only real point at which the residence of a customer may be ascertained, AFMA is keen to better understand the requirements of suppliers where the customer may change residence and become an Australian resident. For example, where a service is provided to a consumer that moves from another jurisdiction to Australia, albeit temporarily, and the supplier of the service is not obliged to engage with the consumer from a regulatory perspective, it would appear onerous for the supplier to be compelled to determine, on a case-by-case basis, whether the supply is being made to someone located in Australia that is now an Australian resident.

Registration requirements

Noting the comments above regarding the difficulties associated with determining whether, at the commencement of a relationship with the customer, the supplier will be making a supply to which the proposed amendments apply, similar issues arise in respect of determining whether the foreign supplier is required to register. It is not apparent to

AFMA whether, in the circumstance where a foreign provider of brokerage service provides such services to an Australian consumer but they are GST-free whether such services are included in the registration threshold. The commentary at paragraphs 1.41 – 1.45 of the draft Explanatory Memorandum deals with the circumstance where the supplies are GST-free only because they are enjoyed outside the indirect tax zone.

* * * * *

In making this submission, AFMA is seeking further engagement with Treasury and the ATO to ensure that the proposed measures, as they continue to be refined, properly reflects the policy intention without imposing significant administrative costs or giving rise to unintended consequences.

Yours sincerely,

Rob Colquhoun
Director, Policy