Australian Custodial Services Association

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General Manager
Small Business Tax Division
The Treasury
Langton Crescent
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By Email: taxlawdesign@treasury.gov.au

Dear Sir/Madam

***Tax compliance – improving compliance through third party reporting and data matching* – Exposure Draft and explanatory material**

The Australian Custodial Services Association (ACSA) welcomes the opportunity to provide this submission to Treasury on the issues raised in the exposure draft legislation and explanatory materials and specifications for the third party reporting proposals (TPR Proposals).

About ACSA

ACSA is the peak industry body representing members of Australia's investment custodial and administration sector. Collectively, the members of ACSA hold securities and investments of approximately AUD $2.5 trillion in value in custody and under administration. Members of ACSA include National Australia Bank Asset Servicing, BNP Paribas, RBC Investor Services, JP Morgan, HSBC, State Street, Northern Trust and Citigroup.

ACSA's involvement in the TPR Proposals so far

ACSA has been an interested party in the TPR Proposals since they were announced in the 2013 Budget. In March 2014 ACSA lodged a written submission on the Discussion Paper released in early 2014. This submission followed various discussions between ACSA and Treasury representatives and a meeting arranged by the Australian Taxation Office prior to lodgement of the written submission.

Since release of the TPR exposure draft and materials, ACSA attended another meeting with the ATO (Paul MacKenzie, Christina Pilkington) in Melbourne on 27 July 2015. At this meeting the following points were discussed:

- In relation to the proposals for the 'trustee' category:
  - The proposals as currently drafted could potentially apply to a licensed custodian holding securities for a client under a bare trust arrangement;
  - The existing governance and tax regulatory framework for wholesale and institutional investors ensures there is proper calculations and reporting of capital gains arising from the sale of securities. Such investors are generally regarded as being in the low tax risk category;
  - Further, the volume of transactions and associated tax data for wholesale and institutional investors is much larger than that for other categories of investors;
  - Therefore the proposals are not intended by Treasury or the ATO to apply where the custodian's client (beneficiary) is a wholesale or institutional investor;
  - The intention is to exclude superannuation funds from the list of third parties required to report;
  - For foreign clients, there would be little or no value in the ATO receiving the information as CGT is generally not applicable to gains or losses.

- In relation to the proposals for the 'managed fund' category:
  - The general objective of the proposed data collection requirements is to facilitate the pre-filling of CGT calculations in the tax returns for taxpayers outside the categories of wholesale or institutional investors;
  - The data sought in relation to movements in the unit register will be confined to units held for non-wholesale/institutional unit holders.
  - The data will need to be included in the AIIR lodged by the managed fund.
- In relation to 'reportable securities', the intention is to exclude TOFA and non-TOFA debt securities.

In relation to the specific proposals set out in the TPR Proposals, ACSA comments as follows:

Trustee entity class

The scheme of the exposure draft is to have a very broad general requirement that trustees of a trust (other than a unit trust) are required to report transactions relating to 'reportable securities' resulting in a change to holdings. There is a separate provision for the Commissioner to exclude specified classes of entities. We understand the intention is for an exclusion to be created where the beneficiary of the trust is a wholesale or institutional investor.

This intention is inconsistent with the approach taken in the Discussion Guide distributed as part of the TPR Proposals. This guide states the entities that will not need to report

include 'trustees who are providing the beneficiary details to the investment body or lodging a tax return'. It was noted at our meeting that custodians do not lodge trust tax returns in relation to income or capital gains from custody assets held for a client[1]. Further, custodians do not provide beneficiary details to investment bodies.

ACSA believes the exclusion of wholesale and institutional investors from the ambit of the trust provisions should be enshrined in the legislation rather than needing to rely on the exclusion by legislative instrument approach set out in the current draft. There should be clear comments in the explanatory memorandum (EM) that this category of investors is outside scope of the data reporting requirements.

A similar concern relates to the definition of 'reportable securities'. The ED defines this term by reference to the meaning given in the *Corporations Act*. That definition is potentially very wide and would include all equity securities and all debt securities. The inclusion of 'debentures' as reportable securities would appear to mean that debt securities are within scope. The case law on the meaning of 'debenture' is extremely wide and broadly includes any debt instrument or debt obligation. Further, interest from debt securities is already reported to the ATO annually through the AIIR and material gains or losses from the disposal or realisation of debt securities are not common. This would mean custodians would need to rely on the Commissioner making the appropriate legislative instrument to exclude debt securities from the reporting requirements that would otherwise exist if the ED proceeds in its current form.

We note that if trading and corporate actions data for wholesale and institutional investors was sought from custodians, the volume and complexity of information would be very large – several million events and trades each year. We have major concerns about how the ATO could accommodate such large volumes of data, much of which would be of no value.

The proposed inclusion of several types of corporate action events is a general cause of concern if there is an expectation from the ATO that the processing and data capture for such events is uniform across custodians. Systems and processes vary amongst custodians for various reasons including client requirements, the type of investment system, compatibility with global systems and non-tax uses of data. If the ATO is requiring uniformity of data capture and systems processes across all custodians this could impact other uses for which data is used in areas such as unit pricing, valuations, accounting, APRA reporting, performance and analytics.

If extension of the measures to wholesale and institutional clients is excluded by legislative instrument then the concerns will not arise immediately. However, if the Commissioner's ultimate intention is to include such clients in the reporting

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[1] Note ACSA has consistently maintained with Treasury and the ATO that custodians should not be required to lodge tax returns or account for tax as a trustee in respect of income and capital gains relating to clients. Attached is a submission (dated 15 February 2012) on the Treasury Reform paper '*Modernising the taxation of trusts*' setting out ACSA views on this issue (particularly pages 2 to 4).

requirements, then compliance with ATO uniform reporting standards will be a major issue for ACSA members particularly if they are inconsistent with other data uses.

We continue to have reservations about the usefulness of the data sought for purposes of calculating assessable gains and losses and pre-filling tax returns. If the data sought does not include acquisition costs (purchase price and transaction costs) and does not identify parcels realised then it will not be a complete data set to calculate realised gains. As the measures for trustees do not extend to wholesale or institutional investors, this issue will not have immediate effect. However, if the measures are extended to such investors then the issue would be real and ACSA would expect the ATO to consider carefully whether it really wants to insist on provision of voluminous data which is not capable of producing complete tax calculations.

In defining wholesale and institutional investors, ACSA submits that the following entity types should be included:

- Regulated superannuation funds;
- Managed funds/managed investment schemes;
- Listed companies or trusts;
- Global custodians and global broker dealers;
- Life insurance and general insurance entities;
- Government entities;
- Charitable organisations.

Managed funds

In general terms, ACSA has concerns about the usefulness of the data sought by the ATO and how it could facilitate an enhanced taxpayer experience through an expansion of the pre-filling process. The comments made above in respect of 'reportable securities' are also applicable to managed funds.

The custodian should have access to sale or redemption proceeds and purchases but will only in the most straightforward of cases know the acquisition costs or acquisition dates. If the unit holder holds multiple parcels of units acquired at different dates and for different prices, then the custodian (and the ATO) will not know which parcel should be allocated to the sale/redemption. If the number of units sold or redeemed does not correspond exactly to the number of units in an existing parcel, then remaining parcels will need to be reconstituted to allow proper matching for future sales/redemptions. We would have grave reservations if the ATO was to force a particular parcel selection method on taxpayers in order to make its pre-fill calculations accurate.

There is an issue regarding finality of data to be provided. Where the data to be provided (eg, redemption proceeds, capital return or tax deferred amounts) is in any way impacted by annual tax calculations of the trust not finalised until sometime after the end of the relevant tax year, then it would be pointless for data to be provided until final numbers are known. If such data was required by the ATO prematurely and used as a

basis for pre-fill calculations it would be confusing to individual unit holders and their tax agents and would likely lead to increased, rather than decreased, compliance costs.

The current proposal is that the required data be lodged 31 days after the end of the reporting period. If the data is to be reported by a managed fund in its AIIR then the lodgement date of 31 July 2015 is inconsistent with the current lodgement date of 4 months after year end (31 October) (or such other date as extended by the Commissioner). This inconsistency needs to be clarified. Further, the proposed due date is unlikely to be achievable because the focus of available resources is on undertaking distributions for the end of the reporting period.

A question for Treasury and the ATO to consider is what level of detail would be provided to an individual taxpayer in the pre-filled return. Will it include all details necessary to calculate the realised gain or loss on sale/redemption of units? If it does not, and this level of detail is not readily available to the tax agent of the individual or the individual if conducting their own tax affairs, there will be no way to reconcile the calculation. This could lead to compliance costs for the individual increasing rather than decreasing.

Finally, the TPR Proposals do not consider how the possibility of duplicative reporting could be eliminated. There is potential for duplicative reporting under the current proposals where the unit holder of the managed fund is holding as trustee for a beneficiary or is first in line of a chain of trusts. This issue should be addressed in any revised exposure draft and associated materials with the objective that intermediaries are not unnecessarily required to report transaction details.

Start date and regularity of reporting

The suggested start date of 1 July 2016 is not achievable. ACSA custodial members have very complex systems and will typically have forward work programs for the next 12 months. The change process is detailed and would require dedicated project resources. ACSA expects that this process would take at least 18 months from release of the final requirements. The availability of such requirements is subject to a number of issues being resolved and clarified as set out in the submission and submissions by other stakeholders. Once the policy principles are settled, the wording of the exposure draft/legislative bill would need to be revised and the wording of any proposed legislative instrument would need to be released for comment (if in fact the requirement for a legislative instrument remains – we submit there should be no such requirement).

Finally, we note the suggestion for the reporting cycle to be more frequent than annual. ACSA recommends that any move to a shorter reporting cycle should only occur after 1 July 2020 after ATO consultation with industry. This will mean custodians and managed funds are able to bring in the annual reporting as required and to assess functionality and issues with their systems and processes.

Australian Custodial Services Association

We would be happy to discuss with you ACSA's views on these issues. Please contact Mick Giddings on (03) 8641 0898 or Gordon Little on (02) 8262 5227 to arrange this.

Yours sincerely

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Australian Custodial Services Association

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