



15 January 2016

Mr Tom Reid
Law Design Practice
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: taxlawdesign@treasury.gov.au

Dear Tom,

**Commissioner's Remedial Power
Exposure Draft**

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 write in relation to the Exposure Draft, draft accompanying Explanatory Memorandum and Information Paper detailing the proposed Commissioner's Remedial Power. Our submission primarily responds to the consultation questions embedded in the Information Paper.

AFMA support

At a macro level, AFMA supports the proposal to confer upon the Commissioner a remedial power to cure technical defects or anomalies in the taxation law, and particularly where the power may only be operated in circumstances where there is no detriment to the taxpayer. There have been a number of instances where there has been a clear misalignment between the stated purpose of a particular provision and the technical language adopted in the provision, and historically the ATO has been unable to adopt

anything but a technical interpretation of the legislation. Further, due to factors such as Treasury resourcing constraints, obtaining a legislative amendment in an expeditious manner has often not been feasible.

Accordingly, the proposed amendment provides an avenue for efficient resolution of these issues, as and when they arise, and fits well with the existing commitment by the Commissioner to administer new pieces of taxation legislation in accordance with their stated policy intent.

It must be noted, however, that the proposed Commissioner's power should be viewed as a mechanism to enable efficient amendment to the operation of the taxation law and not as a substitute to legislative amendment. The primary record of the rights and obligations of taxpayers will continue to be the words of the statute and it remains pivotal that the law is updated and amended as is necessary. There would appear to be a useful segue between the proposed sunseting process and the requirement that the legislation remains current and correct. We discuss this further below.

Consultation process

AFMA agrees that there should be one central repository for raising issues that industry believes may be appropriate for the Commissioner to exercise the remedial power, and the ATO's Consultation Hub should be the appropriate source both for the raising of issues and also consultation/communication with industry and other external stakeholders. In AFMA's view, this consultation process needs to be transparent in terms of each of the steps articulated in the Discussion Paper, notably whether the Commissioner has formed a view that there is an issue that could potentially be subject to the exercise of the power and also whether the Commissioner has decided (or not) to exercise his discretion to use the power. Ideally, further, there should be additional consultation on the design of the legislative instrument.

It is noted that while the Information Paper and draft Explanatory Memorandum both acknowledge the commitment and process for the Commissioner to undertake consultation on the proposed exercise of the power, this is something that the proposed legislation itself is silent on. In particular, the words of Paragraph 1.12 of the draft Explanatory Memorandum confer a clear obligation on the Commissioner to consult, but this obligation is not reflected in the Exposure Draft. Ideally this obligation should be reflected in the law, particularly given our understanding that there is otherwise no legislative compulsion for consultation to occur in respect of proposed legislative instruments.

In relation to consultation question 2, AFMA is of the view that the proposed consultation and implementation process strikes the appropriate balance between expeditious resolution of issues and ensuring robust consultation and transparency.

On the implementation point, we would seek further clarity as to how a taxpayer evidences a conclusion that the modified outcome arising by virtue of the exercise of the

remedial power will/will not give rise to a more favourable outcome. We have assumed that this conclusion will be evidenced through the manner in which the taxpayer prepares their tax return, but believe further information could be provided to ensure that any conclusion as to the application of the exercise of the power to a taxpayer's circumstances is appropriately evidenced.

Review

Given the nature of the proposed remedial power, and the circumstances in which it may be exercised, AFMA agrees that a post-implementation review of the power within two years of the passage of the legislation is appropriate.

AFMA agrees that where the Commissioner exercised the remedial power, the resultant legislative instrument should sunset after five years. This will help create a discipline around ensuring that more permanent changes are made to the legislation (where appropriate) to address the issues that were the subject of the exercise of the power. That is, on the premise that the power will be exercised either where there is a technical deficiency in the legislation, such that the words of the statute were not consistent with the stated policy intent, or where the power gave rise to a reduction in compliance burden, both of these circumstances would appear appropriate to be legislated, and a five year period appears ample for such legislative amendment to occur. Consistent with our view that the remedial power should not be considered a replacement for technically correct legislation, the proposed sunseting mechanism should provide appropriate rigour around ensuring that changes to the operation of the law are ultimately legislated. To that end, we would contend that the third dot point on page 6 of the Information Paper is the most important, that is, if the law has not been amended to reflect the exercise of the remedial power, but is a better resolution mechanism, then the amendment should be prioritised.

Budgetary impact negligible and modified outcome favourable

One area of the proposed circumstances in which the remedial power may be exercised that may benefit from additional guidance is the reconciliation of the requirement that the budgetary impact of the exercise is negligible but that it only applies to taxpayers where the outcome is favourable for the taxpayer. While this is intuitive in the circumstances where the exercise of the power results in a reduction of compliance costs, this is not true in circumstances where the exercise of the power affects the calculation of primary tax. That is, given that the application of the remedial power only operates one way, it is difficult to understand circumstances where it would not result in an impact on revenue.

If the issue is one of materiality, then perhaps the legislation or Explanatory Memorandum could assist in quantifying "negligible." Alternately, where the exercise of the power merely gives legislative approval to existing industry practice, and hence there

will not be any change in behaviour and therefore no cost to revenue, it would be useful to clarify this in the Explanatory Memorandum.

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We appreciate the opportunity to provide a submission on the Exposure Draft. Please contact me with any queries.

Yours sincerely,

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

Rob Colquhoun
Director, Policy