AFMA

1 March 2017

Committee Secretariat
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee,

Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017
Diverted Profits Tax Bill 2017

The Australian Financial Markets Association (AFMA) represents the interests of well over 100 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.

A substantial proportion of AFMA's members would be considered to be "significant global entities" (**SGE**) for the purposes of the *Income Tax Assessment Act 1997* (**the 1997 Act**) and accordingly are within the scope of the proposed amendments set out in the *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017* and the *Diverted Profits Tax Bill 2017* (together **the Bills**).

We welcome the opportunity to provide comments to the Committee in relation to both the proposed Diverted Profits Tax and also the proposal to increase penalties for SGEs.

1. Diverted Profits Tax

With regards to the proposal for Australia to implement a Diverted Profits Tax, AFMA has previously lodged submissions in relation to the Treasury Consultation Paper titled "Implementing a Diverted Profits Tax" (**the Treasury Consultation paper**) on 24 June 2016 and also in relation to the Exposure Draft on 22 December 2016. Our comments below are to be read in light of these previous submissions and have been provided to the

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Committee with a view to potentially addressing our concerns through short and discrete amendments to the Bill, based on appropriate recommendations from the Committee, as follows.

No Expansion to Existing Law

As the scope of the proposed Diverted Profits Tax has been refined through the consultation process, it has been AFMA's consistent position that the operation of the Diverted Profits Tax should not expand the existing law. That is, the primary catalyst for the Diverted Profits Tax, as noted in the Treasury Consultation Paper, is to:

> "encourage taxpayers to be more transparent and co-operative with the Commissioner" …"(w)hile not expanding the coverage of the corporate tax base."

In addition, we note the comment in paragraph 1.141 of the draft Explanatory Memorandum that the rate applicable to a Diverted Profits Tax assessment has been set at 40% to "encourage taxpayers to pay the lower corporate tax rate through complying with Australia's tax rules."

Shortly stated, based on these comments and our understanding of the policy intent underpinning the proposed Diverted Profits Tax, it is our view that the Diverted Profits Tax should have no application to a circumstance where the relevant taxpayer could not self-assess a corresponding liability under the existing taxation legislation.

Accordingly, we recommend that the legislation implementing the Diverted Profits Tax clearly articulate that the ambit of the measure is constrained by the existing tax legislation and that this be done through an additional object in proposed Section 177H(1), for example, the insertion of a new subsection 177H(1)(c) which would provide:

> "to ensure compliance with Australia's existing taxation legislation without expanding the scope of that legislation"

or words to that effect.

Removal of Double Assessments and Provision of Last Resort

We understand that given the Diverted Profits Tax is levied under a separate imposition instrument (i.e. the *Diverted Profits Tax Bill 2017*) then there may be no restriction against the Commissioner of Taxation issuing assessments under both the *Income Tax Act* and the *Diverted Profits Tax Act* (when enacted) with <u>both</u> assessments simultaneously due and payable by the taxpayer. We propose the Bill include a mechanism to prevent double taxation in respect of a single liability.

In addition, we note that the Diverted Profits Tax is to be housed within Part IVA of the *Income Tax Assessment Act 1936.* Our view is that provisions contained within Part IVA should operate as "provisions of last resort" - that is, the provisions are only operable

when other specific provisions cannot apply. We propose in this instance that the legislation includes a specific requirement such that the Commissioner is obliged to seek to assess the taxpayer under the existing provisions before looking to invoke the Diverted Profits Tax. This would require a provision ensuring that any adjustment under, say, Division 815 of the *Income Tax Assessment Act 1997* would reduce the tax benefit determined under the Diverted Profits Tax. We note that the Explanatory Memorandum seeks to address this issue by noting (at paragraph 1.18) that:

> "(a)lthough the DPT is not a provision of last resort, consistent with the operation of Part IVA, it is expected that the DPT will be applied only in very limited circumstances. It is intended that the Commissioner would apply the DPT only after he or she has given consideration to the operation of the ordinary provisions of the income tax law."

We submit that the requirement to consider the operation of the ordinary provisions of the income tax law be included in the legislation to provide appropriate safeguards around this expectation.

Increased Penalties for Significant Global Entities

We welcome the opportunity to provide comments in relation to the proposal to increase penalties for Significant Global Entities (**SGEs**), particularly in relation to the proposal to increase failure-to-lodge penalties by a factor of 500. Our comments below should be read in light of AFMA's submission to the Exposure Draft dated 19 January 2017.

As the Committee is aware, and given the changes to the penalty unit amount from $180 to $210, the result of the proposed amendments (in the context of failure-to-lodge penalties) is that where a document is required to be lodged with the ATO "in the approved form" and the document is not lodged within 16 weeks, a non-deductible penalty of up to $525,000 may be imposed.

In our view, the exponential increase in penalties that may apply to SGEs justifies legislative protections to ensure that the imposition of such penalties is proportionate to the compliance breach. We believe there are circumstances that the taxpayer may not be aware of the compliance obligation, which necessitate protection from the imposition of such a material penalty. It is also our view that the compliance obligations to which the enhanced penalties could potentially apply should be split between those which are indicative of obfuscation/non co-operation (and hence within the policy scope for the proposed changes) and those which do not relate to the taxpayer's own obligations but rather enhance the operation of the tax system.

The Explanatory Memorandum to the Bill states, at Paragraph 2.31, that "the Commissioner will apply the same approach for remission of FTL Penalties for significant global entities as it does for other taxpayers" and refers to PS LA 2011/19. This Practice

Statement appropriately allows for remission where there are "circumstances beyond the control of the entity, where it is fair and reasonable or where imposing the FTL penalty would not provide a just result." While each of these criteria is entirely reasonable, there is no compulsion on the Commissioner to adhere to the terms of the Practice Statement and no remedy for taxpayers should he or she fail to do so. In addition, there is no restriction on the Commissioner amending or even repealing the Practice Statement at a future point. We submit that it is a matter for the legislature, and not the ATO as the administrator of the law, to ordinarily determine the circumstances where the penalty is appropriate or where remission should occur. Accordingly these criteria should be included in the legislation, to provide appropriate protections and assurance to taxpayers that the enhanced penalties will only be imposed where appropriate.

Further, given the increase in potential penalties, we submit that the ATO's current administrative practice of not including the amount of the penalty as a relevant factor in whether the penalty should be remitted should be reversed and that the quantum of the penalty should specifically be included as a relevant factor in determining whether remission should occur.

In terms of further appropriate safeguards for taxpayers, we submit that there should be a prohibition against the ATO issuing an FTL penalty where it has not issued a written notification to the SGE that the required form is outstanding and offered a reasonable period (say four weeks) for lodgement of the outstanding form. The basis for such a requirement is that there may be circumstances where the SGE may have formed the view that lodgement was not required. For example, where the SGE has lodged accounts with ASIC that the SGE believes qualifies as "general purpose financial statements" then the SGE may have formed the reasonable view that there is no further requirement to lodge accounts with the ATO. To the extent that the ATO takes a differing view i.e. that the accounts lodged with ASIC are not "general purpose financial statements" then technically the SGE has failed to lodge. A positive notification of the compliance obligation, coupled with a reasonable timeframe to remediate, is an appropriate safeguard in such a circumstance.

Finally, the compliance obligations that an SGE may have can be broken down into documents relevant to its own affairs (tax returns, accompanying schedules, country-by-country reports, etc) and those which assist with the efficient operation of the tax system (AIIR Reports, FATCA Reports, CRS Reports, TFN Reports, etc). Given that the policy catalyst for the increased penalties, as set out in paragraph 2.5 of the Explanatory Memorandum, is to "help deter tax avoidance" then it is appropriate that the increased penalties only apply to obligations relevant to the SGE's own tax affairs.

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Thank you for the opportunity to provide feedback on the Bills and accompanying Explanatory Memorandum. We would welcome the opportunity to discuss the submission further.

Yours sincerely,

Rob Colquhoun
Director, Policy