



15 January 2014

Ms Annamaria Carey
Assistant Commissioner
Australian Taxation Office
GPO Box 9990
Sydney NSW 2001

Via Email: Annamaria.Carey@ato.gov.au

Dear Annamaria,

ATO Administrative Binding Advice and PSLA 2008/3

The Australian Financial Markets Association (AFMA) represents the interests of over 130 participants in Australia's wholesale banking and financial markets. Our members include banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. AFMA welcomes the opportunity to make a submission on PSLA 2008/3 and the circumstances in which the ATO may provide Administrative Binding Advice (**ABA**). AFMA is aware that the Financial Services Council has already made a submission on this issue.

AFMA's submission is structured in the following way. Firstly, we set out why the current ATO ruling products leave a gap in providing written binding advice to taxpayers. Secondly, we explain why an expanded scope for ABA would close this gap with no incremental risk for the ATO. Finally, we provide some examples of where an expanded ABA would be beneficial.

1. Existing Ruling Products

Currently, the ATO provides written advice about the application of laws administered by the Commissioner in the form of Public and Private Rulings, as well as ABAs. The legislative framework for rulings is provided in Part 5-5 of Schedule 1 to the *Taxation Administration Act 1953*. AFMA is of the view that there is a gap in the existing forms of written advice arising due to the limited scope of topics upon which ABAs may be issued.

Public Rulings (including Class and Product Rulings) are most relevant where the commercial information upon which the ruling is sought is already in the public domain (e.g. through a Product Disclosure Statement) and the potential investors involved are numerous and usually predominantly retail in nature. AFMA suggests that they are not appropriate for transactions that involve commercial-in-confidence information, are likely to be more bespoke in nature, and/or where the group of investors that will likely be the subject is limited in number and likely to be sophisticated in nature.

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Private Rulings provide greater confidentiality with respect to the intellectual property of the offeror but only offer protection for the respective applicants. Where there is a group of investors, under the current regime it is necessary that a separate Private Ruling must be obtained for each investor; an administratively cumbersome and costly process. A Private Ruling is also of no assistance where the product has not yet been offered and therefore a particular investor has not yet been identified at the time that the advice is sought.

ABAs lie in between Public and Private Rulings. They have the benefit of being in-confidence, like Private Rulings, but like Public Rulings are not limited in application only to the applicant taxpayer. In addition, they can be applied for directly by a product offeror such as an AFMA member rather than the actual taxpayer. However, the topics on which the ATO currently provides ABAs is restricted to an exhaustive list provided in Attachment B in PSLA 2008/3 (reproduced here in Appendix 1). We understand that where a taxpayer has requested an ABA that does not fit within the exhaustive list of items the ATO will generally not provide the ABA. This list is strictly interpreted rather than being interpreted according to the principles embodied in the listed items. As a result, there is still a significant gap between the advice provided by Public and Private Rulings which ABAs currently do not cover.

2. Expanded scope for ABA

It is AFMA's submission that the exhaustive list of topics for which an ABA may currently be provided should be revised and expanded. The reasoning for limiting ABAs to their current restrictive list is not apparent either from the *Tax Administration Act 1953* or from PSLA 2008/3.

ABAs should be issued by the ATO on the same list of topics for which Public and Private Rulings are issued, but where a ruling would not be the appropriate form of ATO advice (and where the issues are not adequately addressed by other forms of published ATO guidance). This would close the gap in the ATO's current written advice products. At the very least the current exhaustive list should be administered based on the principles underpinning the items, rather than the specific current listing of a particular item.

An expanded scope ABA would provide the ATO with the same level of control and scrutiny of transactions as a Private Ruling, with the added advantage for the ATO that the ABA could be sought prior to the subject of the advice being offered and implemented by investors. This is consistent with the ATO's real time engagement compliance model which applies, in particular, to the "key intermediary/client interface" taxpayers administered by the Public Groups and International (PGI) division of the ATO. It would also improve the effectiveness of the reliance on advice exception in the context of the Promoter Penalty regime.

Such ABAs would protect commercially sensitive information, while still having an application similar to a Class or Product Ruling. As such, AFMA would contend that there is no material risk to revenue different to that applying to a Public or Private Ruling.

AFMA understands that the ATO has provided some ABAs in circumstances which are not strictly within the limited particular circumstances set out in PSLA 2008/3 but where the principles were broadly similar to such circumstances and notwithstanding a Class or Product Ruling or multiple rulings could have been given (but were deemed inappropriate given commercial sensitivity or undue administrative burden involved). The expansion in scope of ABAs would allow this approach to be administered on a consistent basis.

Expanding the scope of ABAs (or possibly introducing a new category of ruling) would improve co-operation between the ATO and PGI administered taxpayers by enhancing the

ATO's commitment to providing certainty and providing greater opportunity for taxpayers to obtain such certainty.

3. Examples of situations where an expanded ABA would be preferred

a) ABA for non-residents

AFMA members frequently transact with non-resident counterparties. An ABA could be obtained by the AFMA member for reliance by such counterparties confirming matters such as the withholding tax obligations, if any, on Australian source income and the non-crystallisation of a permanent establishment based on the particular activities of the non-resident.

b) ABA for resident investors

Institutional investors frequently consider trading strategies and products that enhance returns. AFMA members could obtain ABAs in advance of offering such arrangements to clients. This would protect commercial intellectual property and avoid the involvement of the client if a successful ABA is not obtained, i.e. it is best to offer a viable product to clients with ATO sign-off already received.

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Please contact me if you would like to discuss further.

Yours sincerely,



Rob Colquhoun
Director, Policy (Taxation)