19th January 2017

Small Business Entities and Industry Concessions Unit
Department of the Treasury
Langton Crescent
PARKES ACT 2600

Via email: SGEpenalties@treasury.gov.au

Dear Treasury,

Increasing Administrative Penalties for Significant Global Entities

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.

The bulk 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 to the *Taxation Administration Act 1953* (**the TAA**).

We set out our comments in relation to the Exposure Draft and the draft Explanatory Memorandum below.

Inadequate Consultation Period

We wish to put on the record our concerns in relation to the consultation period for comments to be provided in relation to the Exposure Draft and draft Explanatory Memorandum. In this regard, we note that the Exposure Draft and draft Explanatory Memorandum were released for public comment on 20 December 2016 with a request for submissions on or before 13 January 2017. Noting public holidays over the Christmas/New Year period, this was a consultation period of three weeks. As Treasury

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is aware, member-based organisations such as AFMA provide submissions based on member feedback, and having a truncated consultation over the period when members are generally out of the office significantly stymies our ability to seek and receive considered comments. This is of particular concern when, as is the case in this instance, there is expected to be only one consultation on the proposed amendments.

Our concerns are endorsed by the "Best Practice Consultation: Guidance Note" issued by the Department of the Prime Minister and Cabinet in February 2016. This Guidance Note states that "(t)imeframes for consultation should be realistic to allow stakeholders enough time to provide a considered response. Avoid holiday periods…depending on the significance of the proposal, between 30 and 60 days is usually appropriate for effective consultation. Longer consultation periods may be necessary when they fall around holiday periods."

The consultation period in relation to the Exposure Draft and draft Explanatory Memorandum belies the gravity of the proposed amendments. In particular, it is noted that the amendments potentially impose a non-deductible penalty of up to $450,000, regardless of the nature of the document that has not been lodged on time, i.e. whether the document is one that is relevant to the SGE's own tax position (such as an income tax return) or one that is provided to assist with the administration of the tax system (such as a quarterly report of new Tax File Numbers). Hence, there is a lack of proportionality between many of the compliance obligations held by SGEs and the penalty that would *prima facie* apply in relation to certain compliance obligations for SGEs.

As such, the comments below should be read as preliminary in nature. To the extent that the Bill that reflects the Exposure Draft is referred to a Senate Committee for review, AFMA will provide additional comments based on the comments obtained from the AFMA members.

Legislative protections for SGEs

The exponential increase in failure to lodge penalties for SGEs, in our view, necessitates a rebalancing between the legislative protections provided to SGEs and protections provided by the ATO in terms of its administration of the law. This is particularly the case given that such protections are currently housed in Practice Statements, such as PS LA 2011/19, which are not binding on the Commissioner. That is, given the quantum of the penalties under the proposed amendments, it is appropriate that SGEs have enhanced and enshrined protections.

The quantum of potential penalties arising under the proposed changes requires, in our view, the following legislative protections:

- 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 written notification from the ATO to the SGE that it has a particular compliance obligation is a decision that may be the subject of review or objection;

- A requirement that the ATO consider the quantum of the proposed penalty as a relevant factor when considering remission of the penalty (in contrast to the comments in paragraph 1.27 of the draft Explanatory Memorandum); and

- The law should reflect the requirement articulated in PS LA 2011/19 that the Commissioner should remit the penalty where it is fair and reasonable to do so.

The requirement that the Commissioner advise the SGE of the requirement to lodge an outstanding return is particularly important where the SGE may have formed the view that such lodgement was not required. For example, were the Commissioner to deem that an SGE had a permanent establishment under the Multinational Anti-Avoidance Law (**MAAL**) then the Commissioner could technically impose failure to lodge penalties for the deemed permanent establishment in relation to outstanding tax returns. As such, it is important that SGEs are aware, and are able to agree, that they have a particular lodgement obligation to which the penalties may apply.

Alignment of General Purpose Financial Statement Penalties

We note the technical amendment in the Exposure Draft such that the requirement for an entity to lodge a general purpose financial statement is that such a statement be lodged "in the approved form." We also note that the specifics of this requirement is still under consultation with the ATO and it is not, at this stage, abundantly clear as to the ambit of this requirement and whether certain statements that are currently lodged by SGEs with ASIC qualify as general purpose financial statements.

The effect of this proposed amendment in the Exposure Draft is that where an SGE does not lodge a general purpose financial statement with the ATO, it is potentially liable for a penalty of up to $450,000. As Treasury is aware, the requirement to lodge a general purpose financial statement to the ATO arises where the statement has not previously been provided to ASIC.

Given that an SGE is able to lodge a general purpose financial statement with ASIC, thereby removing the requirement to lodge with the ATO, there should be symmetry between the penalties imposed by both agencies for failure to lodge statements. Our understanding is that ASIC will impose a late lodgement fee of $316 where the form is lodged more than one month after its due date. As such, there is no proportionality between the penalties imposed upon an SGE by the ATO vis-à-vis ASIC under the proposed amendments.

The legislation needs to align the penalties for general purpose financial statements between those imposed by ASIC and those imposed by the ATO. This should occur

through the legislation specifying that the FTL penalty for non-lodgement of the general purpose financial statement is that prescribed by ASIC.

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Thank you for the opportunity to provide feedback on the Exposure Draft and draft Explanatory Memorandum. Please let me know of any queries.

Yours sincerely,

Rob Colquhoun
Director, Policy