



19 June 2009

The General Manager  
Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Attention: Mr Michael Harms, Indirect Tax Division

By email: GSTadministration@treasury.gov.au

Dear Sir / Madam

**Submission - Treasury Discussion Paper - "Implementation of the recommendations of the Board of Taxation's review of the legal framework for the administration of the GST"**

I refer to the Treasury Discussion Paper in relation to the "Implementation of the recommendations of the Board of Taxation's review of the legal framework for the administration of the GST" ("**Discussion Paper**"). I also refer to a telephone discussion between Mr Michael Harms of your office and Jeffrey Lum on 10 June 2009, regarding an arrangement permitting lodgement of a submission from the Australian Securitisation Forum, Inc. ("**ASF**") by 19 June 2009.

In the Discussion Paper, Treasury:

- invited interested parties to lodge written submissions on the design of the implementation of measures described in the Discussion Paper; and
- encouraged the identification of any other issues, including interaction issues with other parts of the tax law, which may be relevant to the design of the measures; and
- asked a number of focus questions for recommendations on which feedback is sought.

We are grateful for the opportunity to make a written submission to Treasury on the Discussion Paper.

**1. Summary of submission**

In response to the Discussion Paper, the ASF's submission is as follows:

- **Urgent legislative clarification** is needed to correct a clear deficiency in the GST grouping rules that currently precludes warehouse and securitisation trusts, as wholly owned but insolvency remote special purpose vehicles, from being members of GST groups.
- The GST grouping rules can be clarified by relatively simple and minor drafting amendments to the *Taxation Administration Act 1953*.

- The legislative clarification sought is within the scope of the Government’s announced intention in the Assistant Treasurer’s recent Press Releases and the Discussion Paper to streamline and improve the legal framework for the administration of the GST, minimise compliance costs, streamline GST administration and remove existing anomalies in the GST law.
- Specifically, the particular clarification sought to the GST grouping rules is within the scope of the revisions described in Chapter 2.7 of the Discussion Paper that are aimed at reducing compliance costs and uncertainty for entities forming a GST group, and is a relevant and appropriate response to the focus questions raised within that Chapter.
- Treasury has acknowledged the role, importance and unique position of the securitisation industry (represented by the ASF) in the current lending market, as highlighted by the Treasurer’s announcement of an investment by the Australian Office of Financial Management in \$8 billion of residential mortgage-backed securities. From a GST perspective, warehouse and securitisation trusts are similarly in a unique and disadvantageous position under the current GST grouping rules.
- Legislative clarification is required to enable similar GST outcomes to be achieved under bank and non-bank lending structure. Furthermore, there would be a significant reduction in compliance costs, including the time and cost associated with applying the “associate” rules in the GST law, the complexity of which has created difficulties for both the industry and the ATO for a number of years (and continues to do so).

## **2. Background to the ASF**

The ASF was formed in 1989 to promote the development of securitisation in Australia. As the peak industry body representing the securitisation market, the ASF performs a pivotal role in the education of government, regulators, the public, investors and others who have an interest or potential interest both in Australia and overseas, regarding the benefits of securitisation in Australia and aspects of the securitisation industry.

The Australian securitisation market enjoyed rapid growth over the last 10 - 12 years, until the global credit crisis struck in mid-2007. The size of the market, based on the values of securities outstanding by Australian securitisation vehicles, has increased from A\$10 billion in March 1995 to nearly A\$200 billion by the end of 2007.

Consistent with overseas securitisation markets, a large part of the growth of the Australian securitisation market has been in mortgage-backed securities, driven by both the banking and non-banking sectors.

In addition to residential mortgage loans, the types of assets that have been securitised to date in Australia include:

- Vehicle and equipment loans and leases
- Credit and charge card receivables
- Trade receivables
- Collateralised loan obligations
- Net interest margin (income streams)
- Commercial mortgage loans and leases

### 3. GST grouping rules and securitisation

There is a clear deficiency in the current GST grouping rules that precludes warehouse and securitisation trusts from being added as members to a GST group.

Warehouse and securitisation trusts are generally wholly owned but insolvency remote special purpose vehicles. The need for such trusts to be insolvency remote (even though they are wholly owned) creates a technical obstacle precluding them from being added as members of GST groups. The technical obstacle is the imposition of joint and several liability of *all* GST group members for the net amounts of representative members of GST groups.

The inability of trusts to be added as members of GST groups has caused a significant increase in the compliance and administration burden and associated compliance costs due to the need for each taxpayer to account for GST and input tax credits in relation to multiple trusts.

More significantly, Treasury may be aware that the inability to add trusts to GST groups has invoked the operation of the “associate” rules, which apply in relation to the adequacy of consideration for transactions between mortgage managers and those trusts. For certain members, this has resulted in protracted compliance activity between members and the Commissioner of Taxation that have continued for at least 4 years.

We hope Treasury would appreciate the resulting compliance costs incurred by taxpayers over a number of years, including both in-house time and resources and the cost of engaging external professional advisors. Treasury should also be aware that issues between certain members and the Commissioner of Taxation are still yet to be resolved, due to the complexity of issues.

Accordingly, **urgent legislative clarification** is needed to the GST grouping rules to confine joint several liability for the purpose of enabling warehouse and securitisation trusts, as wholly owned but insolvency remote special purpose vehicles, to become members of GST groups.

The limiting of joint and several liability from GST grouping for insolvency remote vehicles is not a novel concept, as there is currently an exception for entities that are precluded *by an Australian law* from incurring joint and several liability for tax (such as life insurance companies): see subsection 444-90(2) in Schedule 1 to the *Taxation Administration Act 1953* (“TAA”).

Nor is the concept of restricting joint and several liability for tax by way of agreement a novel concept. For example, the income tax law provides for a comprehensive regime for tax sharing agreements to be entered into by members of tax consolidated groups, which limit liability between members of those groups. There has been no standardisation of rules governing joint and several liability arising under the GST and income tax laws respectively.

The ASF considers that trusts would generally fall outside the current exception in section 444-90 of Schedule 1 to the TAA, as the insolvency remote status of warehouse and securitisation trusts is not imposed under “an Australian law” but rather underlying contractual arrangements.

It is submitted that clarification could be provided by way of relatively simple and minor amendments to extend the scope of subsection 444-90(2) in Schedule 1 to the

TAA to entities that are precluded by an Australian law or by contractual arrangement. Alternatively, the current exception could be extended to deal specifically with warehouse and securitisation trusts.

For further background, we **attach** a copy of our original submission to the Board of Taxation on this issue.

#### **4. Discussion Paper and broad scope of changes to GST grouping rules**

We refer to Press Release No. 042 by the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs on 12 May 2009, in which the Assistant Treasurer confirmed that the Government would implement a number of recommendations made by the Board of Taxation, which would specifically include “adopting more principled and flexible GST grouping rules”.

In particular, in the table set out in Attachment A to that Press Release, the Assistant Treasurer supported Recommendation No. 32, of which one of the initiatives was that:

*“GST grouping membership rules should be simplified and broadened by replacing the detailed rules with principle-based rules”.*

Based on this Press Release, the recommendation is scheduled to be implemented by 1 July 2010.

We also refer to Press Release No. 048 issued by the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs on 12 May 2009, in which the Assistant Treasurer confirmed that the Government would implement a number of reforms to GST administration as part of:

*“steps to streamline and improve the legal framework for the administration of the GST... reduce the compliance costs of the GST and achieve greater standardisation between the GST and income tax regimes ... [and] ... ensure that transactions are treated in an efficient and effective way under the GST”.*

Specifically, in the Discussion Paper, the key objective of the Government’s reforms to GST administration is stated to be:

*“to ensure that compliance costs imposed under the GST law are minimised to the extent possible having regard to the multi-staged transaction based nature of the GST” and*

*“also streamline GST administration and remove existing anomalies in the GST law” (para. 1.1.13)*

The Discussion Paper also stated that:

*“As the Board of Taxation noted in its report, administering and complying with the tax law imposes a cost on the community. Excessive compliance costs and complexity in the law that is imposed on taxpayers can also detract from their ability to comply with the law ...” (para. 1.1.14).*

Chapter 2.7 of the Discussion Paper specifically addresses proposed changes to the GST grouping rules.

Amongst other things, the Discussion Paper confirms the Government's intention that:

*“GST grouping membership rules will be simplified and broadened by replacing the detailed rules with principle-based rules”; and*

*“[t]hese measures are aimed at:*

- simplifying and broadening the GST grouping membership rules; and*
- reducing compliance costs and uncertainty for entities forming, altering and revoking a GST group or GST joint venture” (para. 2.7.3).*

The focus questions on GST grouping in the Discussion Paper include:

*“Q.7B Do the proposed grouping membership rules provide sufficient clarity? If not, what matters require clarification and how could further clarity be achieved? In regard to the family models, do the proposed rules provide sufficient clarity in relation to:*

- interposed entities; and*
- when an entity is controlled by an individual or family member?*

...

*Q.7D Can the proposed grouping membership rules be further simplified whilst still achieving broadly the same outcomes and reducing compliance costs?*

...

*Q.7G Would the proposed CEA adequately address industry concerns about uncertainty, compliance costs, negative impact on companies' credit ratings and the disincentive for entities to joint or form a GST group arising from the current rules?*

...

*Q.7I Would there be greater compliance cost savings from requiring a single BAS for the group to be lodged by the representative member, with the associated aggregation of data from all the other members, or from requiring each entity to lodge its own BAS with the associated costs of lodging BAS?”*

A number of issues involving increased GST administration are being experienced by ASF members to date. Addressing the above focus questions specifically, we respond as follows:

#### *Q.7B – Clarity in grouping rules*

For ASF members, the proposed GST grouping rules would not provide sufficient clarity without also addressing the obstacles created by joint and several liability as it affects the warehouse and securitisation trusts.

#### *Q.7D – Further simplification*

If the proposed GST grouping rules can be implemented in conjunction with the requested legislative amendments described in this submission, this would result in much better outcomes for members whilst significantly reducing compliance costs.

There would be 3 areas of improvement in outcomes and compliance costs:

Firstly, warehouse and securitisation trusts would be provided with a real and practical option to take advantage of the GST grouping rules. In accordance with the stated Government intention in the Discussion Paper and Press Releases, the rules would become broader and more flexible in this regard. In our view, wholly owned entities such as warehouse and securitisation trusts should be entitled to take advantage of GST grouping as much as other taxpayers without the difficulties faced by members to date.

Secondly, the administrative benefits resulting from these changes would be as follows:

- reduce the number of BAS to be completed, lodged and cash-flow managed. The time taken to lodge the BAS for multiple trusts would be significantly reduced by GST grouping;
- a substantial reduction in administration through having to apply for and maintain a large number of digital certificates as authorised by public officers in each case; and
- the related time and cost savings in having to maintain and review multiple running balance accounts corresponding to each trust.

Thirdly, the main area of GST administration that would be benefited by the changes sought in this submission is that related entities (such as warehouse and securitisation trusts), if grouped for GST purposes, would no longer need to consider and account for GST and input tax credits under the “associate” rules for transactions between those entities.

As mentioned in Section 3 of this submission, the potential time and cost savings for ASF members going forward would be enormous.

At this point, we emphasise that:

- legislative clarification should be relatively simple and minor in terms of drafting; and
- there is unlikely to be an adverse revenue impact vis-à-vis other wholly owned entities that are able to be grouped for GST purposes; and
- the changes proposed in this submission would not create a competitive advantages for any particular type of taxpayer within the lending industry. Rather, it would enable a similar GST outcome to be reached by bank and non-bank lenders.

#### *Q.7G – Clean exit rules and addressing industry concerns*

The proposed changes to the clean exit rules for GST grouping are to be commended as they are necessary for all taxpayers in the context of leaving a GST group.

However, they do not sufficiently address the “*uncertainty, compliance costs, negative impact on companies’ credit ratings and the disincentive for entities to join or form a GST group arising from the current rules*”, since the uncertainty, compliance costs and disincentives etc arise for ASF members as a result of being precluded from grouping warehouse and securitisation trusts under the current rules.

#### *Q.7I – Benefits of a single BAS*

Our view is that there are greater compliance cost savings associated with lodging a single consolidated BAS for a GST group, rather than lodging a number of individual BAS. We refer to our response to Q.7D for more details.

In summary, we believe that the changes requested in this submission are:

- clearly consistent with the stated Government intention of simplifying and improving GST administration;
- aligned with the Government’s specific objective and commitment to provide taxpayers with more flexibility in the context of GST grouping; and
- relevant and appropriate feedback in response to the particular focus questions raised in Chapter 2.7 of the Discussion Paper.

### **5. Consistent with other Government policy and initiatives**

On 26 September 2008, the Treasurer in Press Release No. 105 announced a Government initiative under which the Australian Office of Financial Management would purchase up to \$8 billion of Australian residential mortgage-backed securities (“**RMBS**”). This was stated to be “part of the Government’s commitment to strong and effective competition in Australia’s mortgage markets”.

In that Press Release, the Government also stated that:

- “[t]he Rudd Government is committed to ensuring that Australia's financial markets continue to perform strongly and provide Australian households with a wide range of financial products at competitive prices”
- “[s]ince the deregulation of the financial system in the 1980s and 1990s, the RMBS market has provided an important source of funding for new and smaller mortgage lenders to compete with the major banks”
- the purchase of RMBS would “reinvigorate the Australian RMBS market and support competition in mortgage lending”
- the purchase of RMBS would be “a temporary initiative that responds to highly unusual conditions in international capital markets and their impact on Australia's mortgage lending market”; and
- the initiative “demonstrates the Government's determination to promote the efficient operation of Australia's financial markets and to ensure robust competition in the mortgage market to put downward pressure on mortgage interest rates”.

It is clear from the Treasurer’s comments in the above extracts that the RMBS market, which is represented by the ASF, is in a unique position in the current market environment. The Government acknowledged the importance of the RMBS

industry's role in the lending market to the point of taking steps to intervene to help restore competition to the lending market.

The current application of the GST law to the activities and structures of the warehouse and securitisation trusts that issue RMBS is similarly unique. These trusts have additional layers of GST administration and compliance and related costs caused by restrictions on GST grouping. The complexity of the GST law and its application to the securitisation industry continues to be demonstrated by ATO compliance activity for certain members, which has continued for a number of years.

Consistently with the Treasurer's comments and the Government's recent initiatives in the RMBS market, the ASF requests urgent clarification to the GST grouping rules to provide sufficient flexibility for warehouse and securitisation trusts to be added to a GST group, without threatening their status as insolvency remote vehicles.

This would ensure that similar GST outcomes can be reached by banks and non-banks, without changing the underlying tax base or causing adverse revenue impacts vis-a-vis other lending structures.

## **5. Request for meeting**

It is the strongly held view of the ASF that clarification is required as a matter of urgency. Lack of access to GST grouping arrangements is reducing the competitiveness of securitisation as a funding source for both business and households.

We would welcome an opportunity to meet with Treasury to discuss the current GST issues faced by the securitisation industry, the proposed solution in this submission, resulting benefits for members and legislative drafting options that may achieve the outcome sought.

Should Treasury wish to discuss this submission with a representative of the ASF, please do not hesitate to contact me on (02) 9463 4612.

Yours faithfully



 Patrick Tuttle  
**Deputy Chairman**  
**Taxation Committee**  
**Australian Securitisation Forum, Inc.**

cc Attachment