Australian Banking Association

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Dear Virginia

Practical Compliance Guideline 2019/8DC1 - Draft Schedule 2 – Transaction Accounts

The Australian Banking Association (**ABA**) welcomes the opportunity to provide comments on the draft Schedule 2 of the Practical Compliance Guideline (**PCG**) 2019/8DC1, which sets out the ATO's proposed risk framework on apportionment methods used to determine the extent of GST credit entitlement relating to deposit and transaction accounts of Australian Authorised Deposit-taking Institutions.

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

As was highlighted in our submission to the working draft of the PCG on 5 February 2020, the ABA does not see it helpful to re-prosecute in detail our significant disagreement with the technical basis of GSTR 2019/D1. This draft Ruling is the primary technical source for Schedule 2, and therefore the flaws of that draft Ruling flow through to Schedule 2. We take a similar attitude to re-iterating the fundamental points raised in our submission of 5 February, and so will concentrate on the ATO's comments in the recent 'Summary of responses to issues raised by the Australian Banking Association (ABA) in confidential targeted consultation' (**Summary of Responses**) to our positions as stated in the previous submission.

We emphasise again that our lack of detailed commentary on the previous points raised should not be taken as the ABA resiling from any of the positions previously put in the ABA's numerous submissions, meetings and discussions on this and related issues over the last 18 months. We have continued to expressly articulate our fundamental positions on the factual and technical operation of these supplies and transactions flows, and it is evident that the ATO is not open to fundamentally revising its positions, which we continue to characterise as flawed.

In the end, we reluctantly agree with the position expressed at several points in the Summary of Responses, in that it will be up to individual ABA members to engage with the ATO on the application of the PCG to their particular factual circumstances. We note our disappointment with this as an outcome of a multi-year interaction between the ATO and the ABA as an industry association.

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General comments

Schedule 2 of PCG 2019/8DC1 is fundamentally flawed and should not be released in its current form. The ABA urges the ATO to consider further and meaningful consultation with the industry. The ABA cannot endorse the approach adopted by the ATO in the revised draft PCG 2019/8DC1 and encourages the ATO to properly address a number of outstanding interpretational, practical and conceptual issues outlined in the ABA's submission to GSTR 2019/D1 before Schedule 2 of the PCG is finalised.

The ABA notes that the Green Zone extent of creditable purpose (**ECP**) rate has been set at no more than 20 per cent as a weighted average across all acquisitions to the extent they are for use in making supplies in your transaction accounts business. We reiterate our view that this is significantly below what is a fair and reasonable rate, and it remains unclear to the ABA as to how this rate was derived by the ATO and the data that was used to calculate the rate.

The finalisation of Schedule 2 of the PCG in its current form will create further levels of uncertainty for ABA members, given the lack of supporting evidence in law and an approach and methodology for calculating a Green Zone rate that continues to remain unclear.

Specific comments

Green Zone

The table at paragraph [65] of Schedule 2 of the PCG specifically notes that a taxpayer will not be eligible to use the Green Zone rate of 20 per cent if more than 50 per cent of the total number of transaction accounts provided do not involve the taxpayer making any taxable suppliers of interchange services. Schedule 2 does not provide any clarity as to how the 50 per cent should be measured and how accounts should be categorised for the purposes of this test. The ATO should clearly outline this in the Schedule. The ABA recommends that the 50 per cent rate be applied if interchange services could be provided to 50 per cent of accounts regardless of whether the accountholder actually used that functionality, as it would seem impractical to require the individual institution to have to periodically assess whether interchange has been used.

Furthermore, Schedule 2 does not provide any clarity on the ECP rate that individual institution should apply in the event they have not met the 50 percent transaction accounts requirement and are ineligible for the 20 per cent Green Zone rate. We would recommend this be clearly outlined in the Schedule to avoid any uncertainty.

In relation to 'on us' supplies, the ATO in issue 6 of the Summary of Responses refers to see item 12 of the compendium to PCG 2019/8 as the rationale for their ongoing treatment of 'on us' transactions as having no connection with taxable supplies. We emphasise that we do not consider this rationale (as currently articulated) is technically sufficient to sustain a position that negates the factual material provided to the ATO over the last three years, which clearly demonstrates such a connection.

We note the comments in issue 7 of the Summary of Responses that adherence with the Green Zone criteria "does not absolve taxpayers from applying the relevant GST provisions in determining their ECP rate, nor does it create a safe harbour rate for account providers." Given the background to the introduction of this PCG, and the stated interaction between the PCG and the ATO's 'compliance approach', the ABA requests that the ATO expand upon the circumstances (not included in the 'Red Zone' triggers already) which would put a taxpayer's use of the Green Zone ECP rate into doubt.

Blue Zone

In relation to the transaction count method in issue 12 of the Summary of Responses, the ABA disagrees with ATO's response, as it simply continues the ongoing misunderstanding of the ATO in its view that an interchange (taxable) supply is somehow not a valid separate transaction to the related account supply. These are different supplies (with different GST classifications governed by different provisions in the Act and Regulations). It is only by ignoring the simultaneous and parallel interchange supplies and concentrating solely on the underlying account supply, that this can be viewed as 'skewing' or 'double counting' transactions. The ATO rationale for effectively ignoring these supplies is yet to be properly expressed.

Red Zone

The comments in issue 13 of the Summary of Responses are insufficient. The ATO are yet to clearly outline the technical basis for a principled position that any recovery rate, even using the strict criteria of the Blue Zone >50%, automatically triggers the Red Zone approach. This criteria appears to be arbitrary without further explanation from the ATO.

GST free supplies

We note in issue 8 of the Summary of Responses that GSTD 2020/D1 is referenced, as the technical justification for the position taken on GST free supplies in Schedule 2. The ABA will be making a specific submission to this draft, which we consider is fundamentally flawed. We assume that any amendments made to that draft Determination will be fully reflected in the final version of Schedule 2 to the PCG.

Conclusion

If the basis of this draft Schedule 2 of the PCG is to provide certainty and consistency to the treatment of ECP calculations on deposit and transaction accounts, the existence of so much uncertainty with regard to the technical positions in GSTR 2019/D1 fundamentally undermines this intention.

The ABA considers that current draft of Schedule 2 of the PCG contains numerous fundamental flaws which would need to be addressed before it can be finalised. We therefore recommend that the ATO reconsider finalising Schedule 2 of the PCG and if necessary, work with the industry to reach an appropriate resolution which is supported by a technical analysis of the law.

Whilst the ABA acknowledges that this approach will require further effort from both parties, it will still be less than what has already been invested and should go a long way to reaching an outcome that has a firm and demonstrable basis in law. We do not consider the proposed approach to be unreasonable given the investment that the ATO and the ABA have already made to this process.

Thank you for the opportunity to provide comments on the draft Schedule 2 of this PCG.

Yours sincerely

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