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Base Erosion and Profit Shifting Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

OECD BEPS TRANSFER PRICING – SUBMSISSION ON CONSULTATION PAPER

We would like to thank the Treasury for the opportunity to make this submission in response to its Consultation paper, ***Income Tax: cross-border profit allocation - review of transfer pricing rules.***

Introduction

The Franksons Group is a strategic consulting firm, specialising in primarily in new and emerging technology businesses across South-East Asia, Europe and North America. Franksons also invests in new technology and resource projects around the world. Therefore, much of Franksons work is affected both directly in our projects that we own and indirectly through our clients. Franksons also provides legal and visa services to international businesses, including tax advice, structuring and litigation.

With staff in our team who have previous experience at companies such as Deloitte & EY, across countries ranging from USA, UK, Asia and Australia, our team has experience an expertise in Finance, Law & Policy, and Technology consulting and we would like to thank our team who assisted with research and preparation of this submission: Mr Golam Hadi, Ms Nicole Flax, and Mr Jonathan Djasmeini.

For more about the Franksons Group, please visit www.franksons.com.

Submission

Whilst we appreciate the context in which Governments within the G20 wish to ensure the integrity of their respective tax systems by preventing excessive transfers of profits by Multi-National Enterprises (MNEs), we wish to raise some concerns as to the broader strategic position in which the Australian Economy places itself. Particularly in view of the political context, we appreciate that G20 Governments need to make decisions reflective of what they perceive to be appropriate measures for revenue collection, whilst at the same time balancing the notion of free market economy and conditions conducive for investment, innovation and business confidence.

However, we also wish to convey strong views as to the impact on global business and trade, efficiency of application of transfer pricing laws, and the overarching effect on tax administration. This is particularly so where businesses are impeded in being able to adapt to changing economic conditions and grow, which in turn reduces the quantum of tax revenues collected by Governments.

As general proposition, we would suggest that the Government take into consideration the impact on large MNEs and the cost in terms of compliance, legal and court fees where tax audits occur, and the consequence of those MNEs reconsidering their level of investment in Australia as a result of higher compliance costs.

It would appear from numerous sources (discussed further in our responses to your questions) that there is concern as to the additional reach and power that the Australian Taxation Office (ATO) will have and whether these particular changes in the transfer pricing laws in accordance with the OECD guidelines will cause MNEs to reduce investment and operations in Australia, thereby reducing the tax base. There may also be additional litigation to challenge the interpretation of some key aspects in the legislation, as demonstrated in case law over the years.

An alternative suggestion would be to create a more favourable and streamlined tax environment for all businesses – one that is still consistent with the OECDs framework – but will have the overall result of more economic activity in Australia, less compliance and litigation related to transfer pricing, which in turn will result in higher tax revenues for the Australian Government.

In regards to your questions:

1. *Would there be any significant unintended consequences for Australia if these recommendations are incorporated as relevant guidance for the purposes of applying Division 815 of the ITAA 1997?*

Where taxpaying entities are deemed to have incurred considerably more tax than they previously encountered, there will be significant motivation for MNEs to challenge the determinations by the ATO, and will arguably do so given the potentially large quantum of any outcome, coupled with the paucity of judicial guidance on many transfer pricing issues, both in Australia [1] and in overseas jurisdictions [2] This sentiment has been echoed by Australian Accounting Firm Moore Stephens.[3]

We are not suggesting there would be a flood of litigation by any means, but in terms of 'significant' and 'unintended' consequences, increased litigation would be detrimental for Australia, in terms of reduced investment and operations by MNEs, slower recovery of tax revenue by the ATO, increased cost to the taxpayer, and increased litigation and wastage of court resources.

[1] For example, see Chevron *Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)* [2015] FCA 1092; *Orica Limited v Commissioner of Taxation* [2015] FCA 1399 (7 December 2015).
[2] *The Queen v General Electric Capital Canada Inc. 2010 FCA 344*, one of few Canadian cases of note.
[3] http://www.mondaq.com/australia/x/256952/Transfer+Pricing/Australias+transfer+pricing+maze+dealing+with+international+tax+avoidance+schemes.

We would suggest either legislative instruments or guidance to reduce the extent of tax controversy and increase efficiency of dispute resolution from any issues arising from the transfer pricing provisions.

2. *Are there any significant challenges with commencing the new Guidance for income years starting on or after 1 July 2016?*

Whilst we are unclear as to specific challenges, there may be some potential issues with entities who do not have sufficient documentation under Subdivision 284-E of the *Tax Administration Act 1953* ("TAA"), given the interaction between s 284-255 of the TAA and Sub- section 262A(1) of the *Income Tax Assessment Act 1936* ("ITAA"), certain taxpayers may have significant challenges with being ready to meet the additional burden placed on them by the next tranche of OECD changes.

We would suggest a transition period of 12 to 24 months to give taxpayers an opportunity to meet their obligations, or alternatively, where a transition period is not considered, a discretion to be afforded the decision maker where the taxpayer has reasonable difficulty obtaining the necessary documentation in view of the new OECD amendments.

3. *It is envisaged in section 815-135 of the ITAA 1997 that documents to be relied upon in applying Australia's transfer pricing rules can be prescribed by way of regulation. Are there any reasons why regulation (as opposed to legislative amendment) is not the appropriate method for incorporating the recommendations contained within the 2015 OECD report.*

Pursuant to commentary in "2", we would raise some concerns as to whether there would be excessive burden placed on taxpayers such that documentation retention would result in more compliance and create further disincentive for business in Australia, resulting in overall reduction in tax revenue.

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4. *What new ATO guidance / explanatory materials do you think the ATO will need to prepare (and what existing ATO guidance / explanatory materials will need to be updated) if the changes by the 2015 OECD Report are adopted?*

Guidance will be required in relation to Action 9 of the OECD report, particularly in terms of resolving issues around level of returns on funding provided by a capital-rich MNE group member overseas, and the resolution of whether their returns correspond to the level of activity undertaken.

Furthermore, in relation to Action 10 of the OECD report, guidance will be necessary to prevent difficulties around re-characterisation of activities for the purpose of transfer pricing. Whether this is formulated in regulations or other guidance, will need to be considered by the relevant law makers.

We would like to thank the Treasury for the opportunity to comment on the Submission. If you wish to discuss our comments further, please contact our office.

Yours sincerely,

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