

SUBMISSION

Submission to Treasury — Multinational Tax Integrity – strengthening Australia’s interest limitation (thin capitalisation) rules

12 April 2023

**The Association of Superannuation
Funds of Australia Limited**
Level 11, 77 Castlereagh Street
Sydney NSW 2000

PO Box 1485
Sydney NSW 2001

T +61 2 9264 9300
1800 812 798 (outside Sydney)
F 1300 926 484
W www.superannuation.asn.au

ABN 29 002 786 290 CAN 002 786 290

File: 2023/10

International Tax Unit
Corporate and International Tax Division
Treasury
Langton Cres
Parkes ACT 2600

Via email: MNETaxIntegrity@treasury.gov.au

12 April 2023

Dear Sir / Madam

Multinational Tax Integrity – strengthening Australia’s interest limitation (thin capitalisation) rules

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to Treasury’s release on 16 March 2023 of an exposure draft *Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Thin capitalisation interest limitation* (Draft Bill).

The submission has been prepared with the support of ASFA’s Tax Specialist Advisory Committee, which consists of superannuation tax professionals from the ‘Big 4’ accounting firms, as well as the heads of tax from many large superannuation funds. Accordingly, this submission carries the weight of the large fund industry and its advisors.

About ASFA

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.3 trillion in retirement savings.

Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

Executive summary

ASFA welcomes the carve-out of complying superannuation entities (that is, both complying superannuation funds and pooled superannuation trusts) from the operation of the proposed rules.

However, ASFA submits that there should be greater certainty as to the operation of this carve-out, particularly in respect of the wholly owned investment holding entities of complying superannuation entities.

Wholly owned entities

ASFA submits that, under the proposed rules, there continues to be a risk that the wholly owned investment holding entities of complying superannuation funds (for example, Australian unit trusts) are associate entities, which would bring these investment holding entities into the thin capitalisation regime.

ASFA submits that this should be addressed by extending the carve-out in subsection 820-905(1A) so it reads:

*“Subsection (1) does not apply to a trustee of a *complying superannuation entity (other than a *self managed superannuation fund) and wholly owned investment entities”.*

In relation to the concept of ‘wholly owned investment entities’, it is submitted that this should extend not just to entities that are 100% owned by a particular complying superannuation entity, but also to entities where 100% of the ownership interests of the entity are held by one or more complying superannuation entities.

Drafting for the superannuation entity exemption

ASFA submits that, under the current drafting, there may be some ambiguity as to how the superannuation entity exemption applies. To provide clarity, it is submitted that the drafting should be amended:

- such that the section does not apply to a complying superannuation entity as a ‘first entity’ or as ‘the other entity’; and
- so that for the purposes of section 820-905, a complying superannuation entity cannot itself be an associate.

In addition, the current drafting excludes associates that are registered schemes under section 820-905(2A). ASFA recommends that the reference in proposed subsection (1A) is extended to carve out complying superannuation entities (excluding self-managed superannuation funds) from the operation of all the subsections within section 820-905, and not just from the operation of subsection (1).

Potential de minimus rule

Further, it is sometimes the case that a small portion of a particular investment entity may be owned by non-qualifying entities – for example, self-managed superannuation funds or where there is ownership under management equity incentives. We submit that a ‘de minimus’ rule should apply, such that the carve-out would still apply if up to an agreed percentage of total ownership was held by non-qualifying entities.

This percentage could potentially align to either the 5% or 15% existing de minimus rules in the Pillar 2 Model Rules for Excluded Entities. That is:

- 5% subject to the holding entity operating exclusively or almost exclusively to hold assets or invest funds for the benefit of the complying superannuation entities or undertaking activities that are ancillary to those carried out by the complying superannuation entities; or
- 15% subject to the holding entity deriving substantially all its income from dividends or equity gains in relation to its portfolio investments.

Recommendation

ASFA recommends that the drafting provide greater certainty as to the operation of the carve-out for complying superannuation entities, particularly in respect of their wholly owned investment holding entities.

If you have any queries or comments in relation to the content of our submission, please contact Julia Stannard, Senior Policy Advisor, on (03) 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

Glen McCrea

Chief Policy Officer and Deputy Chief Executive Officer