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ARA SUBMISSION TO TREASURY REGARDING MULTINATIONAL TAX INTEGRITY

The Australian Retailers Association (ARA) welcomes the opportunity to comment on the Treasury's proposed anti-avoidance measure to deny tax deductions to multinational entities for payments relating to intangible assets connected with low corporate tax jurisdictions.

The ARA is the oldest, largest and most diverse national retail body, representing a \$400 billion sector that employs 1.3 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects and unifies our independent, national and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and territories, across all categories - from food to fashion, hairdressing to hardware, and everything in between.

The ARA recommends that the following principles underpin Australia's approach to taxation of multinational entities (MNEs) noting that the issue of cross-board tax arrangements is international in nature and will require a global response.

1. MNEs should pay their fair share of tax in Australia.
2. MNEs should be taxed fairly and consistently across the globe.
3. Australia's approach to addressing cross-border tax avoidance should be in step with the Base Erosion and Profit Shifting (BEPS) framework, being developed and implemented by the Organisation for Economic Cooperation and Development (OECD).
4. Domestic mechanisms to address tax avoidance need to consider international efforts to ensure that regulations are not duplicated and that Australia's corporate tax system does not become overly complicated.
5. Regulations should be practical and workable for tax paying entities and tax office workers.

While the ARA supports the intention to encourage multinationals to pay their fair share of tax in Australia, we are concerned that this proposed anti-avoidance measure is overly broad and therefore unworkable for tax paying entities as well as those administering this legislation. We have outlined specific concerns below.

THE NECESSITY OF THIS MEASURE IS QUESTIONABLE GIVEN PILLAR TWO IN ACTION ONE OF THE OECD'S BEPS INCLUSIVE FRAMEWORK

The ARA maintains that Australia's focus should be on the implementation of Pillar Two under Action One of the BEPS Inclusive Framework rather than bespoke measures such as this anti-avoidance measure proposed by Treasury. If all countries implement the global minimum corporate tax rate of 15% (as 142 countries have committed to do) this anti-avoidance measure will no longer be necessary as the mischief that the proposed measures are designed to counter will have been dealt with via the Pillar Two rules.

DEDUCTIONS COULD BE DENIED FOR FUNDS TRANSFERS THAT ARE NOT ATTEMPTS AT TAX AVOIDANCE

The ARA is concerned that this anti-avoidance measure gives the Australian Tax Office (ATO) too much power in deciding the value of using intangible assets.

We note that the explanatory materials state that “no deduction is allowed for the payment made by the SGE to the extent that it is attributable to the right to exploit the intangible asset.” In the case of payments to associates in low tax jurisdictions for bundled services where the value of exploiting an intangible asset is not separately identified, it is unclear how the ATO plans to calculate how much of the payment should be attributed to the right to exploit the intangible asset. Without guidance or boundaries, the ATO could deny deductions for payments beyond the value of exploiting intangible assets and creep into payments that are not attempts at tax evasion.

Similarly, we are concerned about the assertion that payments can be re-characterised by the ATO as related to intangible assets on the basis that the right or permission to exploit an intangible asset is implicit or an understanding between the parties. The risk is that little or no evidence is required to assert that there is an implicit right to exploit an intangible asset and that the ATO could make these assertions for payments that are not attempts at tax evasion.

For these reasons, we do not believe that the proposed measure is fair or workable.

IT IS UNCLEAR HOW THE PROPOSED ANTI-AVOIDANCE MEASURE WILL INTERACT WITH ROYALTY-WITHHOLDING TAX

The explanatory materials do not address how these anti-avoidance measures will interact with royalty withholding tax. The ARA understands that this measure is designed to target those MNEs that avoid paying royalty withholding tax by mischaracterising or embedding royalty payments. However, the wording of this legislation would mean that MNEs that do appropriately characterise their payment as royalties and do pay royalty withholding tax would also be denied a deduction for those payment as they are “attributable to the right to exploit the intangible asset.”

The ARA therefore recommends that the government create an exception for payments where royalty withholding tax has been paid.

Thank you again for the opportunity to provide a submission to Treasury. We look forward to further engagement as consultations and the drafting process continues.

Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.