Assistant Secretary
International Tax Branch
Corporate and International Taxation Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email contact:internationaltax@treasury.gov.au

16 April 2024

Sir/Madam

International taxation – global and domestic minimum tax – primary legislation

PwC Australia welcomes the opportunity to make this submission in relation to the exposure draft primary legislation, the explanatory memorandum and the separate discussion paper on interactions with provisions in Australia's existing income tax law released for consultation on 21 March 2024 in relation to Australia's implementation of the global and domestic minimum tax regime.

PwC Australia acknowledges and supports the measures that aim to build trust in the tax system and maintain the integrity of Australia's tax base. We acknowledge the significant legislative undertaking represented by the implementation of global and domestic minimum taxes in Australia, coordinated with the release of similar rules in numerous countries around the world, and appreciate the opportunity to contribute to the development of the rules in Australia.

In summary, our key points relevant to the consultation proposal are as follows:

- We commend the Treasury on putting together such comprehensive legislation and framework to implement the global and domestic minimum tax reforms in Australia which by its nature is complex.
- Given the complexity of understanding and practically applying the new rules in Australia and globally, it is expected that over time, particularly in the early years of application, there will likely be new issues that arise that directly impact the application of the rules in Australia and/or in their interaction with existing laws. After this consultation concludes and the measures are enacted in Australia, there may be the need for potential further refinement of the legislation in Australia and/or guidance issued by the Australian Taxation Office.
- In the context of taxpayer certainty, and the fact that the measures are proposed to apply retrospectively for fiscal years commencing as early as 1 January 2024, we would suggest that the law as required to give effect to the measures in Australia is prioritised having regard to other key priorities of the Treasury and Government. Ideally, all relevant law should be substantively enacted well before the end of 31 December 2024, being the end of the first fiscal year for which the rules would apply and likely to be the first full accounting reporting

period where the impact of any global and/or domestic minimum taxes imposed in Australia would need to be reported in financial accounts.

- We have included a number of recommended updates to the exposure draft primary legislation and in relation to the separate discussion paper relating to the interaction with existing Australian income tax law provisions. We note that the focus of each of these recommendations has been to identify options and opportunities to reduce the compliance burden that may result from the introduction of these rules. These recommendations include, for example, allowing for a single Domestic Minimum Tax (**DMT**) Return for a group as opposed to requiring all Constituent Entities in the group to lodge the return, and considering the potential opportunity to streamline measures in the existing Australian tax law that address similar risks to those addressed in the global and/or domestic minimum tax regimes.

Our specific comments on the particular provisions which Treasury seeks stakeholder views on as noted in the preamble of the Explanatory Memorandum (**EM**) are included in the attached Appendix.

We welcome the opportunity to discuss our submission with you and to engage in further consultation as the specific measures are designed and refined. If you have any questions, please contact Lynda Brumm (lynda.brumm@pwc.com) on (07) 3257 5471.

Yours sincerely

Chris Morris
Australian Tax Leader

Appendix: International taxation – global and domestic minimum tax – primary legislation

All capitalised terms used in this Appendix have the same meaning as in the Exposure Draft primary legislation, unless otherwise stated.

Specific Comments

1. ***Paragraph 3.33 – Delayed exchange of the GloBE Information Return between jurisdictions***

   As set out in the OECD guidelines[1] on the GloBE Information Return (**GIR**), there are two approaches to disseminate GloBE information, either filing the GIR with each tax administration (referred to as 'local filing') or with a single tax administration which exchanges the GIR with other tax administrations under a Qualifying Competent Authority Agreement (referred to as 'central filing').

   We agree with the Australian approach to adopt central filing (consistent with the approach with CbCR lodgements). This also reduces the compliance burden on Constituent Entities and eliminates the need to prepare several versions of the same filing, monitor filing timelines and specificities of each jurisdiction. This was a key objective in the OECD Report, *Tax Co-operation for the 21st Century*[2].

   Where exchange of information is available and receipt of the GIR from the foreign government agency to the Australian Taxation Office is expected, but merely delayed when requested, it is our view that requiring a Constituent Entity to provide the GIR to the Commissioner of Taxation imposes an unnecessary burden on taxpayers which is contrary to the intention of the central filing process. Particularly as there is already a comprehensive mechanism via Double Tax Agreements and Competent Authority Agreement designed to exchange this type of information. It is not clear in what circumstances the GIR could not be provided by the foreign government agency to the Australian Taxation Office.

   We consider that if there are delays in providing the GIR by foreign government agencies, then this should be a government agency responsibility (through the exchange mechanisms already in place) and not that of taxpayers.

   We request that in designing the Australian Pillar Two filing requirements, focus is placed on efficiency in obtaining information and reducing the administrative burden for taxpayers. In respect of the GIR, we request that the Commissioner first uses all powers available to obtain this information before seeking the information from taxpayers. If the only option is to request this information from taxpayers, we request that the 21 day notice period as suggested in the draft EM be extended (to no less than 28 days).

---

[1] OECD (2023), *Tax Challenges Arising from the Digitalisation of the Economy – GloBE Information Return (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, www.oecd.org/tax/beps/globe-information-return-pillar-two.pdf.

[2] OECD (2022), *Tax Co-operation for the 21st Century: OECD Report for the G7 Finance Ministers and Central Bank Governors*,May 2022, Germany, OECD, Paris, https://www.oecd.org/tax/tax-co-operation-for-the-21st-century-oecd-report-g7-may-2022-germany.htm

2. Paragraph 3.41 – Circumstances in which lodgment of the DMT Return by a Constituent Entity might not be warranted

Consistent with the Australian tax consolidation regime, and in order to ease the compliance burden for Australian taxpayers, we recommend that an option be provided that enables a single Australian Constituent Entity to lodge a single DMT Return that covers all Constituent Entities that are members of the same tax consolidated group or multiple entry consolidated (**MEC**) group at the end of the Fiscal Year (i.e. "GloBE consolidated group"). This should either be the head company of the group or the Designated Local Entity. This is consistent with the approach taken by other jurisdictions (for example the UK) implementing the Pillar Two rules. It is also consistent with the domestic minimum top up tax being calculated on a jurisdictional basis, and for which all members of an Australian tax consolidated or MEC group ordinarily should be located in Australia.

As currently drafted, each Constituent Entity that has a DMT liability is required to prepare its DMT return which is lodged either by itself or by the Designated Local Entity on its behalf. Having a legislative option that would enable a single DMT return that covers all of the members of the tax consolidated or MEC group to be filed would and should also be consistent with the proposed measure which assigns the Domestic Top-Up Tax liability to the head company of a GloBE consolidated group as set out in draft Subdivision 127-C of the draft *Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) Bill 2024* (**Consequential Bill**) (also see our comments later regarding this).

Naturally there may be Constituent Entities that are GloBE located in Australia and members of the Applicable MNE Group but which which are not members of the tax consolidated or MEC group which should still have an obligation to file their DMT return (this would also cover any entity that leaves the group during the year). Notwithstanding this, we recommend that an option be provided that allows for the preparation and lodgment of a single DMT Return that covers all Constituent Entities of an Applicable MNE Group that are GloBE located in Australia, filed by the Designated Local Entity.

Furthermore, where an Australian Constituent Entity is required to lodge multiple returns in Australia under the Pillar Two rules (for example, an Australian GloBE Tax Return and DMT Return), we request efficiency in the format of the returns to mitigate the need for duplication of information. Conceptually this may be achieved by a single Australian filing (with the core information provided upfront) and schedules that cover the relevant information that differs for GIR and DMT.

3. Paragraph 3.68 – Franking credits and debits

The proposed amendments under the Consequential Bill provide for a franking credit in respect of Domestic Top-up Tax, which is defined as tax payable under section 7 of the *Taxation (Multinational—Global and Domestic Minimum Tax) Act 2024* (**Assessment Bill**). However, franking credits and franking debits do not arise from Australian tax paid under:

- Section 4 of the Assessment Bill, which imposes a tax liability under the Income Inclusion Rule (**IIR**); or
- Section 10 of the Assessment Bill, which imposes a tax liability under the Untaxed Profits Rule (**UTPR**).

We agree that it is appropriate to recognise franking credits and debits in relation to the payment or refund of Domestic Top-up Tax liability imposed in accordance with proposed section 7 of the Assessment Bill and aligning the timing of the franking credits and debits to the time when tax is paid (or refund is received or applied) is reasonable and consistent with the operation of the Australian franking rules.

In relation to the question as to the period of time that a Constituent Entity of an Applicable MNE Group needs to be a franking entity for Domestic top-up tax to give rise to a franking credit (or franking debit), the reason as to why this timing question is relevant is not set out in the explanatory memorandum to the Assessment Bill. In the absence of further information, it is not clear why the inclusion or exclusion of the nexus to the entity being a franking entity "for the whole or part of the income year" is debatable.

4. Paragraph 3.75 – Interactions with other laws, including the Australian foreign hybrid mismatch rules, controlled foreign company regime and foreign income tax offsets

The OECD recommended in a recent report for the G7 Finance Ministers[3] that:

> *Against the backdrop of the Two-Pillar Solution and other changes to the international tax landscape, countries should eliminate or modify existing rules and measures addressing essentially similar risks which have become duplicative.*

Consistent with the OECD's stated objectives, the introduction of Pillar Two in Australia provides an opportunity for the Government to streamline measures in the existing Australian tax law that address similar risks, which in turn minimises the potential for double taxation, reduces barriers to cross-border trade and investment and encourages the efficient allocation of resources.

Hybrid mismatch rules

We understand Treasury's current position is that it is appropriate for Australia's hybrid mismatch rules to continue operating even if a foreign jurisdiction imposes global or domestic minimum taxes, on the basis that the hybrid mismatch rules target jurisdictions' tax treatment of arrangements and entities, whereas minimum taxes address the shortfall of corporate taxes paid on profits in a jurisdiction.

Whilst we acknowledge Treasury's view, we submit that the GloBE rules ultimately also address the risks which the Australian hybrid mismatch rules currently seek to address, being base erosion through hybrid mismatch arrangements, noting that:

- The GloBE rules have broader scope than the hybrid mismatch rules e.g. deductible payments made to recipients resident in jurisdictions with no or nil rates may not be caught by the Australian hybrid mismatch rules.

[3] *OECD (2022), Tax Co-operation for the 21st Century: OECD Report for the G7 Finance Ministers and Central Bank Governors,May 2022, Germany, OECD, Paris, https://www.oecd.org/tax/tax-co-operation-for-the-21st-century-oecd-report-g7-may-2022-germany.htm*

- Proposed section 3-165 of the *Taxation (Multinational - Global and Domestic Minimum Tax) Rules 2024* (**Rules**) covers intra-group financing arrangements which lower one jurisdiction's GloBE income without a corresponding increase in the taxable income of the other, which address similar risks to the hybrid financial instrument mismatch rule in Subdivision 832-C of the *Income Tax Assessment Act 1997* (**ITAA 1997**).

- The rules in relation to the allocation of GloBE income / covered taxes to / from permanent establishments and tax transparent / reverse hybrid entities address similar risks to the hybrid mismatches in Subdivisions 832-D to 832-G of the ITAA 1997

- The financing integrity rule in Subdivision 832-J of the ITAA 1997 applies in relation to interest / derivative payments which are subject to tax at a rate of 10% or less (in addition to other elements such as principal purpose being present), while the GloBE rules impose a minimum tax rate of 15% without any purpose requirement.

- Specific rules have been introduced to address hybrid arbitrage arrangements under the Transitional CbCR Safe Harbour measures in the December 2023 Agreed Administrative Guidance[4], which we presume will be incorporated into the Rules in due course, with the commentary in that publication stating that further guidance is to be provided to address hybrid arbitrage arrangements that may otherwise affect the application of the GloBE rules outside the context of the Transitional CbCR Safe Harbour.

- The additional information available to tax authorities as a result of the GloBE and DMT reporting measures further disincentivises inappropriate tax planning and reduces tax risk.

Having regard to the above, we make the following suggestions:

1) Given the significant overlap, we suggest that the Treasury reconsider its position that global and domestic minimum taxes are disregarded in identifying whether a payment is subject to Australian or foreign income tax for the purposes of applying Australia's hybrid mismatch rules. We recognise that there may be complexities in adapting Division 832 of the ITAA 1997 to recognise global and domestic minimum taxes and further consultation in relation to both the substantive tax law and information collection mechanisms may be required.

2) We note that the financing integrity rule in Subdivision 832-J of the ITAA 1997 is an Australian specific unilateral integrity measure focussed on interest / derivative payments made to interposed entities in low tax jurisdictions (as opposed to focussing on hybrid financial instruments or entities). Given the GloBE rules impose a floor above the 10% tax rate as applied in Subdivision 832-J of the ITAA 1997, the risk which the financing integrity rule intends to address is effectively covered by the GloBE rules. Accordingly, in the event that the above suggestion at (1) cannot be

[4] OECD (2023), Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), December 2023, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, http://www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar-two-december-2023.pdf

adopted, we are of the view that global and local minimum taxes should be taken into account for the purposes of Subdivision 832-J of the ITAA 1997.

3) Separately, we note that the current Australian imported hybrid mismatch provisions in Subdivision 832-H of the ITAA 1997 imposes an onerous burden on many multinational groups having to trace payments through multiple entities and jurisdictions, even where there is little or no commercial nexus between the payments. The introduction of the GloBE rules, together with hybrid mismatch rules in numerous foreign jurisdictions since 2019 (e.g. the EU's Anti-Tax Avoidance Directive (ATAD) 2 rules) significantly decreases the risk of offshore mismatches which may be imported into Australia. Accordingly, in the event our suggestion at (1) above cannot be adopted, we recommend that global and local minimum taxes should be taken into account in identifying whether a payment is subject to foreign income tax for the purposes of determining whether an offshore hybrid mismatch exists for the purposes of Section 832-620 of the ITAA 1997.

Foreign income tax offsets (FITOs)

In the event the current Treasury position that FITOs are available for taxes imposed under a foreign Qualified Domestic Minimum Tax (**QDMT)** (but not taxes imposed under a foreign IIR or UTPR) is adopted, we suggest that the existing definition of 'foreign income tax' in section 770-15 of the ITAA 1997 be updated to specifically include foreign QDMTs.

The current Treasury position that a natural reading of the FITO rules would result in the same outcome has merit. However, specifically including foreign QDMTs in the definition would provide taxpayers with certainty, given that it removes another potential layer of complexity around statutory interpretation.

The risk of inappropriate outcomes from specifically including foreign QDMTs in the definition of foreign income tax should be minimal given that:

- foreign QDMTs would need to adhere to OECD requirements and pass the common peer review process in order to be qualified; and
- the proposal to amend section 770-140 of the ITAA 1997 to cover scenarios where there is no overall increase in economic tax burden borne in the foreign jurisdiction (which we agree with) should serve as a further safeguard.

Foreign income tax paid by CFCs

Originally introduced in 1990 as an anti-tax-deferral measure[5], Australia's CFC regime has long been recognised as complex and requiring modernisation. For instance, in introducing the 2010 Treasury consultation on CFC reform, the then Assistant Treasurer Senator Nick Sherry noted[6]:

> *Reforms to the CFC rules, while still maintaining the integrity of Australia's tax base, will improve the competitiveness of Australian businesses by reducing red tape and compliance costs for affected businesses.*

[5] Explanatory memorandum to the *Tax Laws Amendment (Foreign Income) Bill 1990*

[6] "Reform of the Controlled Foreign Company Rules", Media release, The Senator the Hon Nick Sherry, Assistant Treasurer, 16 July 2010

Although these efforts have not resulted in any substantive reform to date, we suggest that the introduction of the GloBE rules presents an opportunity for the Government to modernise Australia's CFC regime, particularly since the GloBE rules also serve as an anti-deferral measure based on an agreed minimum tax. Further consultations would be required but given the potential benefits to the competitiveness of affected businesses we suggest that it is worthwhile for the Government to further pursue CFC reform.

In the event substantial reform of the Australian CFC regime needs to be deferred and the current Treasury position that foreign QDMTs should be eligible for the notional allowable deduction under section 393 of the *Income Tax Assessment Act 1936* (**ITAA 1936**) and FITO claim under Division 770 of the ITAA 1997 (provided other relevant requirements are met) is adopted, we recommend that the relevant sections be specifically amended to provide taxpayers with greater certainty, similar to our recommendations in relation to FITOs above.

We also recommend that the tax law be amended to address timing considerations which may otherwise impose an onerous cashflow and compliance burden on taxpayers. For instance, under the current law FITOs can only be claimed once the relevant foreign income tax is paid.

Given foreign QDMTs paid by CFCs are likely to be due much later than when the attributable taxpayer's Australian income tax return and tax payment for the corresponding income year are due, taxpayers would be required to pay the Australian income tax relating to attributed CFC income on assessment for that year of attribution and subsequently amend the return to claim a refund for foreign QDMTs paid.

One way to address this would be to allow FITOs to be claimed for anticipated foreign income tax relating to the income year, with true-up mechanisms to ensure FITOs are ultimately only provided for foreign income tax paid within a certain period.

An alternative way to address this could be to include jurisdictions which implement QDMTs as 'listed countries' as defined in section 320 of the ITAA 1936. Given the introduction of the GloBE rules and QDMTs would result in much greater commonality between the tax regimes of implementing jurisdictions, such an approach would also be consistent with the policy intent of listed countries, being to reduce the CFC compliance burden in relation to jurisdictions which have similar tax systems to Australia.

Interaction with tax consolidation regime

There is nothing in the proposed law that deals with the tax consolidation regime, other than the deeming that the head company of a GloBE consolidated group (as to be defined by proposed Division 127-C) is liable to pay the total GloBE consolidated group amount in respect of all Constituent Entities that are members of that consolidated group.

As discussed earlier, there may be merit in having a single filing of a DMT return (and potentially also the Australian GloBE tax return) for a tax consolidated group which would eliminate the need for multiple filings of individual Constituent Entity's returns for those that are members of the tax consolidated group. If so, this would then also have the consequence of there being only one assessment of Domestic Top-Up Tax (and/or GloBE Top-Up Tax). In such a case, it is clear that the head company of the group would be liable to pay the applicable tax for the whole of the group. In such a case, the aspect of joint and several liability of members as is currently applicable with income taxes would need to be considered. Further consideration of the extension of the "single entity rule" for purposes of working out the

head company and any subsidiary member's liability to any "GloBE consolidated group amounts" should be given.

In relation to the current proposed rule that is said to provide a mechanism to aid in the collection of the relevant taxes of members of a consolidated group, the head company of the GloBE consolidated group is automatically deemed to be liable to pay the "GloBE consolidated group amount". There is no choice for the group to have each member's liability to pay remain separate and for each member to be individually accountable for their liability to pay as and when required. We observe that as currently drafted, in the event that the liability is not fully discharged by the head company, all consolidated group members will have a resulting outstanding GloBE or Domestic Top-Up Tax liability that is determined based on a pro rata allocation of all of the unpaid amount to all of the group members proportionate to their individual liability even if their individual liability was actually paid and funded by that particular member.

5. Any aspects of the new law where additional guidance should be considered, to support stakeholders' understanding and application of the new law

Consistent with our submissions on previous public consultations, we consider that ATO public advice and guidance would be helpful in relation to the application of the GloBE rules and features of the tax law which are specific to the Australian tax system.

We envisage that ATO public advice and guidance would play a key role to support taxpayers in helping ensure that they meet their obligations on time and appropriately For example, guidance that helps taxpayers navigate their reporting and filing obligations in relation to each of the Globe Top-Up Taxes in Australia would be very beneficial, particularly given the high penalties that can apply for failing to meet these obligations.

We also note that there is no legislative process for the appointment of the Designated Local Entity other than it be appointed by all Constituent Entities in the Applicable MNE Group that are GloBE located in Australia (see proposed definition as set out in the Consequential Bill) and more specifically for how and when the Designated Local Entity is to provide notice of the identity of the relevant entity that has given the GIR to a foreign government agency.

Furthermore, given the complexity of these rules, it is our view that public guidance from the ATO that is needed to support taxpayers with the practical aspects associated with the introduction of the global and domestic minimum taxes is the ATO's approach to compliance activity and imposition of penalties in the initial years of its operation. As noted by the OECD, there is a common understanding among implementing jurisdictions on penalty relief that is intended to provide taxpayers with a "soft-landing" during the initial years and jurisdictions are required to give careful consideration as to the appropriateness of applying penalties and sanctions on taxpayers who have taken reasonable measures to ensure the correct application of the GloBE rules[7].

It would also be useful for there to be a known and transparent process by which taxpayers can raise and escalate issues with the ATO and/or Treasury as they work through the new rules.

[7] OECD (2022), *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris