



2 September 2022

By email: MNETaxIntegrity@treasury.gov.au

Attention: Ronita Ram
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Re: Denying MNEs deductions for payments relating to intangibles and royalties paid to no or low tax jurisdictions - Consultation on policy design (August 2022)
ResMed Submission

Dear Ms Ram,

We appreciate the opportunity to make a submission on the proposed policy to deny deductions for payments relating to intangibles and royalties paid to low or no tax jurisdictions (**the proposed policy**).

ResMed is proudly an Australian-born medical technology and healthcare company employing about 1,400 people in Australia, including over 350 in Research and Development, and approximately 500 people in our advanced manufacturing operations at Bella Vista in Sydney's Northwest.

We are committed to Australia thriving as one of the best places in the world to do business. We seek to continue fostering a partnership on economic and healthcare policy reform across connected medical devices and digital health, ensuring that advanced technology and manufacturing remain and grow in Australia.

ResMed supports government policies that will combat harmful tax practices. The OECD two-pillar approach will be pivotal for Australia to address tax challenges from the digitalisation of the economy. ResMed also fully supports the Government's plan to rebuild Australia's proud manufacturing industry.¹ However, the proposal to deny deductions for certain royalty payments will have unintended consequences and may *disincentivise* investment in Australian medical technology (**medtech**) manufacturing without combatting harmful tax practices. To that end, we suggest amendments to the proposal that will mitigate these negative effects while maintaining the policy's original intent.

For additional information, please do not hesitate to contact Chris Merjane (Senior Tax Counsel) at chris.merjane@resmed.com.au or on +61 8884 1733 or Amanda von Leer (Director, Government Affairs) at amanda.vonleer@resmed.com.

Yours faithfully,

A handwritten signature in black ink that reads "Brett Sandercock".

Brett Sandercock
Chief Financial Officer
ResMed

¹ See *A Future Made in Australia*, <https://www.alp.org.au/policies/a-future-made-in-australia>



ResMed background

ResMed is a proudly Australian-born healthcare company founded in 1989 and is now listed on the ASX and NYSE. ResMed is a pioneer of digital innovative solutions that treat and keep people out of the hospital, empowering them to live healthier, higher-quality lives. Our digital health technologies and cloud-connected medical devices transform care for people with sleep apnea, chronic obstructive pulmonary disease (COPD), and other chronic diseases. By enabling better care, we improve quality of life, reduce the impact of chronic disease, and lower costs for consumers and healthcare systems

ResMed operates in more than 150 countries, with over 9,000 patents and designs globally, and significant R&D and advanced medical device manufacturing capability in Sydney, Australia. ResMed employs about 1,500 people in Australia, including over 350 in R&D activities and approximately 500 in our advanced manufacturing operations. We have a highly skilled Australian workforce, including all types of engineers, medical staff, designers, manufacturing staff and professionals. We provide training across a range of trades and practice areas with a strong and recognised graduate and intern intake program. We are one of Australia's largest exporters of medical devices. We also undertake significant R&D investment in other jurisdictions, with a total of approximately 1,350 people employed globally in R&D activities and approximately.

Last year, ResMed built millions of medical devices and masks from our advanced manufacturing facility in Western Sydney. These life-saving medical devices and accessories were exported locally and globally. People across the world are now using their Australian-made ResMed medical equipment to help them breathe better and live higher-quality lives. During the COVID-19 pandemic, ResMed's primary focus was to maximise the availability of ResMed ventilators and other respiratory support devices for the patients that needed them most. This included manufacturing and delivering 7,000 ventilators to the Australian Government.

We are proud of our Australian roots and want to see Australia flourish as one of the best places in the world to do business.

The proposed laws will disincentivise investment in Australian medtech manufacturing

Global medtech companies such as ResMed generally do not generate intellectual property (IP) in a single jurisdiction. IP is developed after decades of investment and innovation globally in a range of locations, diverse talent pools and capabilities. For example, ResMed has major R&D centres in Australia, the United States, Singapore and Ireland. The majority of ResMed's global R&D spend in FY22 of approximately USD \$225 million is outside of Australia.

When ResMed manufactures a medical device system in Australia, it utilises a pool of IP from all around the world. To the extent IP is overseas, ResMed Australia pays royalties to use that IP as required under transfer pricing laws. The majority of ResMed's global profits are in Australia.

The proposed laws will deny deductions to some or all of those royalties, depending on what is considered a "low tax" jurisdiction. The impact of the proposed laws will mean royalties paid in order to manufacture medical devices in Australia will become up to 30% more expensive (due to the loss of a 30% tax deduction). The proposed laws have the unintended consequence of being an additional cost, or a form of 'tax' on Australian advanced manufacturing, particularly when compared to other advanced manufacturing-friendly jurisdictions.



As the Albanese Government has correctly pointed out, manufacturing in Australia has over time become increasingly difficult for industry. We have stated in previous comments to Treasury that it has been increasingly difficult for medtech companies to choose Australia for new investment over other jurisdictions.²

We are concerned that the proposed laws will make Australia even less competitive in the global landscape.

The definition of “low or no tax” jurisdiction is unclear

The Consultation Paper does not specify what is a “no or low tax jurisdiction.”

On one hand, if a high watermark is used similar to the test under Australia’s *Diverted Profits Tax (DPT)* regime (which applies a 24% tax rate threshold), then most OECD countries would be considered “low tax”, including the United States and the United Kingdom. This is clearly not appropriate.

On the other hand, if Government seeks to tax jurisdictions with a corporate tax rate of less than 15%, then such jurisdictions are already being captured under the OECD Pillar II (which proposes a 15% minimum effective tax obligation). In such a case, it makes more sense for the Australian Government to focus its attention on strong laws consistent with OECD Pillar II.

Existing laws sufficiently address Treasury’s concerns

The consultation paper provides the following problem statement:

“MNEs can shift profits to low or no tax jurisdictions using arrangements involving intangibles to avoid paying tax in Australia. The fast growth of the digital economy has exacerbated these practices, with an increasing number of MNEs structuring their ownership of intangibles through low tax jurisdictions, giving rise to integrity risks to Australia’s tax base.”

We agree that such MNE practices are harmful and should not occur. However, there is already a suite of laws to deal with this. Australia’s transfer pricing regime is designed to ensure all intercompany arrangements are consistent with the arm’s length principle. The DPT is an integrity measure that captures MNEs that take any action for “the principle purpose” of obtaining a tax benefit, including shifting profits offshore. Our general anti-avoidance regime (**Part IVA**) will apply where a scheme is undertaken for the dominant purpose of obtaining an Australian tax benefit.

Further, OECD Pillar I will re-allocate taxes to market jurisdictions, and OECD Pillar II will ensure MNEs pay a minimum of 15% effective tax.

In summary, there is an existing suite of laws and measures that will deal with the harmful tax practices outlined by Treasury. We do not believe the proposed laws will add meaningful benefits in combatting harmful practices, but instead, may have unintended consequences for industry. ResMed has proposed a practical solution below.

² <https://treasury.gov.au/sites/default/files/2022-02/c2021-177849-resmed.pdf>



Inconsistent with OECD and other jurisdictions

The proposed measures have not been recommended by the OECD. Australia would be taking unilateral measures that are inconsistent with the approach of other countries around the world.

Although Treasury has outlined other jurisdictions with specific measures to address intangibles and royalties, none of these examples include an outright denial of deductions as proposed.

This inconsistency has three major drawbacks:

- (1) The policy is inconsistent with the principles set out in Australia's international tax treaties. Australia has treaties with more than 40 jurisdictions. It is unclear how such a denial of deduction would operate under our tax treaty obligations, given the denial will effectively result in double taxation. This issue is exacerbated as Treasury and the Australian Taxation Office (**ATO**) considers new concepts such as "embedded royalties" which do not exist in Australia's international tax treaties.
- (2) The policy will make Australia a less attractive investment for companies with large global IP footprints. This is in an environment where many other countries have incentives to attract manufacturing by *reducing* royalty withholding tax for companies that expand their in-country presence.
- (3) It creates uncertainty for businesses that want to invest in Australia, where the rules would differ from international norms.

We strongly recommend Treasury considers firm measures to combat aggressive tax planning, but such measures should be consistent with global principles and have the effect of *attracting* Australian economic activity.

Proposed solution: make Australia a better place to do business

We believe that current laws sufficiently protect Australia's interest in tackling aggressive tax planning, however, we appreciate that Treasury is concerned with tax integrity.

A potential solution may be for the ATO to adopt an enhanced assurance-based model in reviewing the intangibles and royalty transactions of significant global entities (**SGEs**). This will ensure the ATO have sufficient resources to pursue harmful tax practices using the wide array of existing laws and upcoming Pillar I and II laws.

Alternatively, if Treasury insists that the proposed laws proceed, then carve-outs should be legislated to prevent unintended consequences to industry:

- (a) **OECD-compliant tax regimes:** In defining what a "low tax" jurisdiction is, the Australian Government should adopt a standard consistent with OECD Pillar II. Where a jurisdiction meets OECD Pillar II requirements for minimum effective tax, then that jurisdiction should not be "low tax" for the purposes of the proposed rules.
- (b) **R&D and manufacturing carve-out:** Government must not detract investment in Australian R&D and manufacturing. Licensing IP into Australia is part-and-parcel of standing up Australia's domestic capability. A carve-out for IP that is used in R&D and manufacturing will ensure Australian investment is not detracted.
- (c) **Net royalty exporter safe harbour:** ResMed Australia receives significantly more in inbound royalties than it pays in outbound royalties. In other words, ResMed Australia is a net royalty exporter. It is inconsistent with



sound tax policy that inbound royalties are subject to income tax, yet outbound royalties may not be deductible. This economic mismatch can be mitigated through a safe harbour for net royalty exporters.

While adopting these recommendations would mitigate the proposed policy's negative unintended consequences, the Government should do more to proactively invest in our manufacturing sector. Compared to Australia, the return on investment in other jurisdictions where ResMed has innovation hubs is up to 135% greater. This was the primary reason we strongly supported – and continue to support — the adoption of an OECD-compliant patent box that would narrow this gap and make Australia more competitive on the world stage.³

We thank you for your consideration of these comments. We would be happy to arrange a briefing to provide more information and detail if helpful.

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³ See ResMed's previous paper on the proposed Australian Patent Box: <https://treasury.gov.au/sites/default/files/2022-02/c2021-177849-resmed.pdf>