AustralianSuper

27/10/2022

Katherine Davy
Assistant Secretary, International Tax Branch
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: **contact.internationaltax@treasury.gov.au**

Dear Katherine,

Submission on "Global Agreement on Corporate Taxation" Consultation Paper

AustralianSuper is Australia's leading superannuation fund and is run only to benefit members. Almost 2.9 million Australians are members of AustralianSuper and we invest over $260 billion of their retirement savings on their behalf. Our purpose is to help members achieve their best financial position in retirement.

We welcome the opportunity to provide a written submission in response to Treasury's consultation paper, "Global agreement on corporate taxation: Addressing the tax challenges arising from the digitalisation of the economy" (Consultation Paper) and in particular the proposals related to Pillar Two.

AustralianSuper strongly supports the overarching policy intent of the proposed reforms and the OECD's Inclusive Framework, namely, to prevent multinational entities from engaging in base erosion and profit shifting practices in a digital economy and taking advantage of low or no tax jurisdictions to minimise overall tax liabilities.

The purpose of our submission is to address certain domestic implementation issues of the proposed reforms which may create unintended consequences for Australian superannuation funds and adversely affect investment returns for Australian superannuation fund members.

1 Executive Summary

Our submission addresses the following points:

- AustralianSuper supports the "pension funds" exemption within the OECD's Pillar Two rules to address any unintended consequences arising for Australian superannuation funds;
- We recommend that any "top-up tax" or "domestic minimum tax" paid in Australia has franking credit eligibility to address the double taxation consequences which may arise from the domestic implementation of the Pillar Two rules;
- We recommend an amendment to the foreign income tax offset (**FITO**) rules to ensure that additional taxes paid in a foreign jurisdiction in respect of that jurisdiction's implementation of the OECD's Pillar Two rules can be captured within the FITO rules to address any double taxation consequences which may otherwise arise; and
- We request clarity that the Pillar One rules are not intended to apply to Australian superannuation funds in line with the purpose of the rules.

2 Pillar Two

2.1 Pension fund exemption

We strongly support the "pension funds" exemption within the "excluded entities" definition of the OECD's Pillar Two rules. Despite the Consultation Paper being silent on the applicable Pillar Two exemptions within the domestic

context, we expect that there is an intention to implement a corresponding exemption for Australian superannuation funds (including in respect of any domestic minimum tax). This exemption is important for two key reasons:

- The imposition of an effective minimum tax of 15% under the Pillar Two rules could jeopardise the current taxation framework for Australian superannuation funds. This is because the existing 15% tax rate applicable to Australian superannuation funds may be reduced to 10% or 0% under the *Income Tax Assessment Act 1997* (**ITAA1997**), where it is an eligible discounted capital gain or the income is attributable to pension phase members, respectively; and

- The scope and application of the OECD's Pillar Two rules heavily relies on the principles of accounting "consolidation" and, given Australian superannuation fund investments are not generally required to be consolidated for accounting purposes, there would likely be significant practical difficulties in applying the rules.

Pursuant to the OECD's Pillar Two Framework, we also submit that it is important for the exemption to apply to relevant entities owned by Australian superannuation funds, e.g., wholly-owned subsidiaries. In this regard, Australian superannuation funds commonly invest or hold assets through investment vehicles to manage the risks and liabilities associated with investments. Exempting these entities from the domestic implementation of the Pillar Two rules will address any inadvertent gaps arising in practice and ensure that the rules appropriately recognise the regulatory and commercial practices of Australian superannuation funds.

2.2 Franking credit eligibility for Australian top-up tax

As noted in the Consultation Paper, the purpose of Australia's imputation system is to prevent the double taxation of profits at both the company and shareholder levels. This is achieved through the availability of franking credits, which is a specific feature of the Australian taxation system and critical for Australian superannuation funds in the calculation of its tax liability and the flow-through of value for its members.

Australian superannuation funds are significant investors in Australian companies, including the largest Australian listed companies that have significant global operations and hence are more likely to be within the scope of Pillar Two. To the extent there is any top-up tax paid by these companies which does not give rise to franking credits, this would effectively represent an additional tax cost that both negatively impacts returns for Australian superannuation funds and the returns of their members, and undermines the purpose of the imputation system.

We therefore submit that any additional Australian "top-up tax" on income, including in respect of an implemented "domestic minimum tax", should have franking credit eligibility.

We note that the Consultation Paper suggests that the additional Australian tax liabilities that may arise from the implementation of the Pillar Two rules may not have franking credit eligibility as it represents a tax addressing foreign under-taxation. We do not support this view as any top-up tax still represents an amount of Australian tax paid and hence should fit within the imputation system. Alternatively, if top-up tax is considered to be an amount of tax relating to 'foreign' under-taxation then this would suggest that it should be likened to a foreign tax under Australian tax rules and hence eligible for a credit under the FITO rules. We consider franking credit eligibility to be the better view and most appropriate in these circumstances to address the double taxation consequences.

2.3 FITO availability for minimum taxes imposed by foreign jurisdictions

As part of the domestic implementation of the Pillar Two rules, we consider it prudent for there to be a corresponding amendment to the FITO regime under Division 770 of the ITAA1997 to ensure that additional taxes paid in a foreign jurisdiction under that jurisdiction's implementation of the Pillar Two rules do not create unintended double taxation consequences, particularly in the context where investments are made through offshore vehicles that are transparent for tax purposes.

Australian superannuation funds often invest offshore through transparent vehicles and, broadly, are subject to tax in the following manner:

- taxed in Australia in respect of their worldwide income (where the income is attributable to accumulation phase members);

- entitled to claim FITOs in respect of the underlying foreign taxes they are taken to have paid; and
- unable to access the participation exemption for distributions paid on foreign equity distributions under subdivision 768-A of the ITAA1997.

It is these key features of the taxation rules applicable to Australian superannuation funds that result in the importance of the FITO regime to alleviate against the double taxation consequences. We are concerned that a failure to amend the FITO regime to specifically include the global minimum tax as a "foreign income tax" for the purposes of Division 770 may detrimentally subject Australian superannuation funds to double taxation, create uncertainty in the FITO eligibility assessment and result in additional compliance costs for Australian superannuation funds.

3 Pillar One

For completeness, we note our understanding that the OECD's Pillar One rules are targeting the practices of multinational groups in respect of their sales of goods and services and is not intended to apply to Australian superannuation funds.

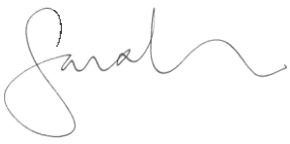
We welcome further clarity in the drafting and domestic implementation of the Pillar One rules so that Australian superannuation funds can have certainty in this regard.

4 Conclusion

AustralianSuper strongly supports reform to prevent multinational entities from engaging in base erosion and profit shifting practices. However, in the domestic implementation of the proposed reforms, we believe it is important to avoid unintended consequences that may erode the returns of Australian superannuation fund members.

We look forward to working with you to find solutions that are consistent with the policy intention of the proposed reforms and we would be happy to make available our internal tax experts. If you have any questions or would like to arrange a discussion, please contact Nick Coates, Senior Manager External Affairs at **ncoates@australiansuper.com**.

Yours sincerely



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