asfa the voice of super

2 September 2015

General Manager
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: taxlawdesign@treasury.gov.au

Dear Sir / Madam,

RE: Exposure Draft – Tax Laws Amendment (Tax Integrity Multinational Anti-Avoidance Law) Bill 2015

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission with respect to the above Exposure Draft ("**ED**").

The Association of Superannuation Funds of Australia (ASFA) is a non-profit, non-political national organisation whose mission is to advance effective retirement outcomes for members of superannuation funds through research and advocacy. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds as well service providers some of whom deal with self managed superannuation funds (SMSFs), has over 90% of the approximately 14 million Australians with superannuation as members. ASFA members manage or advise on the bulk of the $2 trillion in superannuation assets. ASFA is the only organisation that represents all types of superannuation funds and associated service providers.

General comments

ASFA welcomes the consultation process in respect of the ED, and commends the objectives of the ED in addressing aspects of multinational tax avoidance.

Many of the largest Australian superannuation funds are signatories to the United Nations Principles of Responsible Investment ("UNPRI"). ASFA is aware that UNPRI is presently considering the question of multinational tax avoidance in the context of the various environmental, social and governance (ESG) factors to be considered by responsible investors.

The specific comments below address what would appear to be unintended consequences arising from the potential application of the ED, if it were to be legislated in its present form, to Australian superannuation funds themselves, in respect of their investments in foreign jurisdictions.

Specific Comments

1. Exclusion / exemption for Australian superannuation entities from Country by Country ("CbyC") reporting

Prima facie, the CbyC reporting obligations in the ED could apply to Australian superannuation entities (i.e., Australian superannuation funds, Australian approved deposit funds, and Australian pooled superannuation trusts) with annual global revenue ("**AGR**") of greater than $1 billion. This submission addresses the concept of AGR further at section 2 below.

ASFA submits that Australian superannuation entities, and entities that are wholly owned by Australian superannuation entities (such as special purpose vehicles that may be established in Australia to hold one or more of the foreign investments of an Australian superannuation entity or entities), should be excluded from the application of the CbyC reporting rules, and that this exclusion should be specifically addressed in the legislation.

Australia is unusual in a global context in levying tax on its superannuation entities, presently at the general rate of 15%. Most other jurisdictions with large pension fund systems, including the United States, United Kingdom, Netherlands and Canada do not tax their pension funds. As a result, equivalent CbyC reporting rules that may be introduced by these countries are unlikely to apply such rules to their pension funds.

Large Australian superannuation funds now compete for investments, especially in infrastructure and property, with large pension funds from these and other jurisdictions. Accordingly, it is important that, as far as possible, additional compliance costs and rules not be imposed on Australian superannuation entities to those imposed by governments in other jurisdictions on their pension funds.

In addition, the application of Australia's CbyC rules would not seem to be directed at investors such as Australian superannuation entities, and entities that are wholly owned by Australian superannuation entities, as:

- Australian superannuation entities are not multinational entities, and do not have multinational operations, in the usual sense of those terms.
- Australian superannuation entities are not trading entities in the usual sense, but rather hold passive investments, and are not involved in the day to day management of such investments. This is so even for those investments in which an Australian superannuation entity holds a "controlling interest" such that the CbyC rules may prima facie apply. For example, an Australian superannuation entity may hold a "controlling interest" in a shopping centre or toll road, but there will typically then be independent third parties that manage

these assets, such that the Australian superannuation entity remains the passive recipient of rents or similar income streams.

- Australian superannuation entities are low risk taxpayers, without the capacity to "shift" profits between jurisdictions. That is, in the example above, the rents or similar income streams from investments in which "controlling interests" are held will be taxed in the usual way in both Australia and the foreign jurisdictions. The primary concern of Australian superannuation entities is to ensure that income from foreign sources is not subject to double tax.
- There is precedent for the exclusion of Australian superannuation entities, and entities that are wholly owned by Australian superannuation entities, from reporting obligations akin to the CbyC rules. In particular, the Inter-government Agreement between the United States and Australia in respect of the United States' FATCA rules ("**the IGA**") includes such an exclusion for Australian superannuation entities, and entities that are wholly owned by Australian superannuation entities. ASFA submits that any exclusion within the CbyC rules could be framed in equivalent terms to that contained in the IGA.
- The concept of "revenue" for Australian superannuation entities is a volatile one, primarily reflecting investment returns. Accordingly, movements in investment markets could easily result in many Australian superannuation entities being above the AGR threshold in years of good returns, and all or most being below the AGR threshold in years of poor returns. In this context, the concept of revenue would appear to be a very blunt instrument for the imposition of the CbyC rules and consequential administrative costs for Australian superannuation entities. The definition of AGR is addressed further below.

2. Definition of AGR

As noted above, the CbyC reporting obligations prima facie apply to any entity with AGR of greater than $1 billion.

If the CbyC rules were to apply to Australian superannuation entities, the definition of AGR in proposed subsection 177DA(5) of the *Income Tax Assessment Act 1936*, as amended, would appear to be the total "revenue" of the Australian superannuation entity and all entities controlled by it for the purposes of consolidation in its financial statements.

It is not clear what would be included as "revenue" for this purpose. Presently, Australian superannuation entities record contributions from employers and members, and transfers from other superannuation entities, as revenue in the Income Statement. However, with effect from 1 July 2016, new accounting standard AASB 1056 will apply, such that these amounts will be separately disclosed in the new Statement of Changes in Member Benefits, and will not be disclosed in the Income Statement.

In addition, the largest item that will remain in the Income Statement for superannuation entities typically will be the realized and unrealized change in market value of an entity's investments (i.e., basically the investment return for the year, excluding interest, dividends and rent). This amount is volatile, and may be significantly positive or negative depending on market conditions

in the particular financial year. For this reason, it is possible that, based only on the totals in the Income Statement, an Australian superannuation entity may swing back and forth from exceeding the $1 billion AGR threshold and being below this threshold. Monitoring this would itself add to the compliance obligations and administrative costs for Australian superannuation entities.

Finally, in recent years, many Australian superannuation entities no longer consolidate investment entities in which they hold a controlling interest, due to the operation of the "investment entity" exemption within the accounting standards. Accordingly, if an Australian superannuation entity were now to hold (say) 55% interest in a foreign limited partnership that itself holds a shopping centre, the Australian superannuation entity will typically not consolidate this entity, such that only the income attributable to the 55% interest would be recorded in its Income Statement. This differs from the usual position for a multinational company, where the investment entity exemption will not usually apply, such that the entity would be consolidated and the whole 100% of the income of the limited partnership would be shown in the consolidated accounts.

ASFA submits that, if the Government rejects our primary submission (i.e., that Australian superannuation entities, and entities that are wholly owned by Australian superannuation entities, be excluded from the CbyC rules), it is then imperative that either the legislation or explanatory material / guidance clearly articulate how the definition of AGR is to apply to Australian superannuation entities.

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Should you have any questions on any of the matters raised in this submission please contact me on (03) 9225 – 4021 or 0431 490 240 or via fgalbraith@superannuation.asn.au.

Yours faithfully

Fiona Galbraith

Director, Policy