Deloitte Tax Services Pty Ltd
ACN 092 223 240
477 Collins Street
Melbourne VIC 3000
Australia
Tel: +61 3 9671 7000
www.deloitte.com.au

16 April 2024

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

Dear Assistant Secretary,

Deloitte Subsmission
Multinational – Global and Domestic Minimum Tax Exposure draft legislation and Consultation Paper

Please find enclosed our submission in response to the release of exposure drafts of the primary legislation relating to the Multinational – Global and Domestic Minimum Tax and the associated Consultation Paper. We have set out our comments in this submission as follows:

- Appendix A: Taxation (Multinational – Global and Domestic Minimum Tax) Bill 2024 (referred to as the **Assessment Act**), and associated Explanatory Memorandum
- Appendix B: Treasury Laws Amendment (Multinational – Global and Domestic Minimum Tax) (Consequential) Bill 2024 (referred to as the **Consequential Act**), and associated Explanatory Memorandum
- Appendix C: Consultation Paper – Global and domestic minimum taxes: Interactions with other Australian tax laws

The comments in our submission are made in good faith with the intention of identifying some of the key issues in applying the exposure draft to give effect to the policy objectives (as we understand them), seeking to avoid unintended consequences, and help to facilitate the administration of the law and compliance with the law.

Our key submission points are as follows:

a) We appreciate and commend the flexible approach towards incorporating globally designed OECD Model rules and guidance into the Australian legislation by way of the Minister's rule-making powers in Part 4 of the Assessment Act. However we believe that further guardrails are necessary to ensure that group's are not subject to top-up tax due to the retrospectivity of any guidance.
b) We note that the timing of the passage of the subordinate legislation may have an impact on financial reporting requirements under the Australian Accounting Standards.
c) Amendment may be required to give effect to the intended treaty override in proposed subsections 5(3), 5(4) and 5(5) of the International Tax Agreements Act 1953.

Deloitte.

d) Clarity should be provided as to whether the content of the GloBE Information Return (GIR) required under section 127-5, item 27 of the Consequential Act, must include computations pertaining to non-implementing jurisdictions. We understand that this is a matter being considered by the OECD and submit that Australia should adopt an interim position in the absence and until such guidance is confirmed given the forward planning that may be required by many foreign headquartered entities GloBE located in Australia.
e) With regards to paragraph 3.33 of the Explanatory Memorandum, failure to lodge penalties should not apply where a GIR has been filed outside Australia and the UPE is not an Australian entity. We submit that penalties for false and misleading statements should not extend to disclosures regarding entities outside Australia.
f) The form of the Australian GloBE Tax Return (AGTR) and DMT Return should not require information extending beyond that already contained in the GIR or which is necessary to collect or confirm an amount of top-up tax that is payable.
g) Clarity should be provided within the legislation to allow for the election to use the transitional simplified jurisdictional reporting framework referred to in the GIR guidance from the OECD in July 2023 (Note 3.2.4.a.1) for the purposes of the Australian DMT.
h) The head company of a tax consolidated group or MEC group should be able to elect to complete and file a single DMT Return as if it is a single Constituent Entity, in alignment with the Aggregated Reporting election in the OECD July 2023 GIR (Note 3.2.4.b) and Article 3.2.8 of the OECD Model Rules.
i) The administrative collection mechanism for consolidated groups should be extended to MEC groups. Subsidiary members of consolidated groups and MEC groups should not be required to lodge a DMT Return.
j) The anticipated amendments referred to in the Consultation paper surrounding the hybrid mismatch rules, particularly with respect to the impact under Subdivision 832-J of the Income Tax Assessment Act 1997 (ITAA 97) (the hybrid mismatch integrity rule) should be reconsidered. If amended as anticipated we submit that this could lead to unresolved double taxation.
k) We understand that the proposed intangibles measure announced by the Government is actively being considered in parallel to the development of the Global Minimum Tax legislation and we submit that foreign domestic minimum taxes should be taken into account in determining the amount that is 'subject to foreign tax', similar to the hybrid integrity rule above.
l) Clarity should be provided as to the application of Division 770 of the Income Tax Assessment Act 1997 and Part X of the Income Tax Assessment Act 1936 (ITAA 136) where a foreign domestic minimum tax applies.
m) An IIR top-up tax should be creditable against Australian income tax where the same income is subject to both the global minimum tax and Australian income tax, for example through the foreign hybrid entity rules.
n) Clarity should be provided in relation to the income tax treatment of any payments made between members of a GloBE MNE group in respect of the payment or funding of or in respect of a global minimum tax.

These points are elaborated on in the Appendices and we would be happy to discuss any of these issues further. Please contact Amelia Teng on +61 3 8486 1118 or David Watkins on +61 2 9322 7251 to discuss.

Yours sincerely

Amelia Teng
Partner, Tax & Legal

David Watkins
Partner, Tax & Legal

Deloitte.

Appendix A: Assessment Act

Rule-making powers

Per section 23 of the Assessment Act, we understand that the Rules will have retrospective effect and per sections 20 and 24 it is understood that the intention is for future OECD guidance to be able to be efficiently incorporated into the Australian legislative framework. This means there could be instances where such guidance impacts the GloBE treatment of an amount or transaction in a prior Fiscal Year, regardless of whether a GIR has been lodged at that point in time. Given the use of legislative instruments or secondary legislation is explicitly designed to provide flexibility and timeliness, we submit that retrospective application should be limited especially in situations which disadvantage taxpayers dealing with a complex regime. Secondly, we note that there will be a need for clear administrative guidance from the ATO particularly in the initial years of application of the new laws. In the absence of OECD guidance on an issue it would be beneficial for groups to be able to obtain certainty from the ATO on technical interpretation of the Rules, particularly where such issues may have a material impact on their Australian financial reporting obligations.

The Legislative and Notifiable Instruments can also relate to several areas outside of the administration of the ATO including for example foreign laws per subsection 25(a) and accounting standards or financial reporting standards per subsection 25(d). We query whether Rules relating to foreign laws for example is able to be administered by the ATO or whether this is beyond the ATO's powers.

Timeline for introduction

Under the Australian Accounting Standards, a group that is subject to top-up tax under a Pillar Two rule is broadly required to disclose the amount in its financial accounts, subject to materiality. Amendments were made to IAS 12 in May 2023 in this regard and as relevant to the top-up tax imposed under the Assessment Act will take effect when the legislation is substantively enacted, which is commonly taken to mean when it has passed both Houses of Parliament. It is understood that there is an intention to introduce the primary legislation including the Assessment Act in the winter sittings of 2024, with a later introduction of the subordinate legislation containing the computational rules.

As an observation only we note that it will be important for many taxpayers that the primary legislation is passed before 31 December 2024 to ensure that the first year of application of the global and domestic minimum tax can be appropriately recognised in the financial accounts of affected entities. However, to the extent that the primary and subordinate legislation straddles a group's financial reporting date, there may be difficulties determining the disclosure requirements under IAS 12. That is, there may be substantive enactment of the obligation to pay an amount without substantive enactment of the law that computes that amount to pay.

Appendix B: Consequential Act

Treaty override

The Explanatory Memorandum to the Exposure Draft Pillar Two primary legislation states at paragraph 3.74:

> The Imposition Bill, the Assessment Bill and The Rules apply in the event of any inconsistency between these laws and a provision of an Australian bilateral tax treaty, which has the force of law, unless expressed otherwise: subsection 5(3) of the International Tax Agreements Act 1953. This approach is consistent with the OECD Inclusive Framework's intention for both the IIR and UTPR to be compatible with international tax agreements based on the OECD Model Tax Convention.
>
> [Schedule xx, item 19, section 5 of the International Tax Agreements Act 1953]

The intended priority to be given to the Pillar Two provisions leverages off the recently inserted s5(3). Separately, the Exposure Draft Pillar Two primary legislation goes on to propose additional ss5(4)&(5) which allows the Minister to "deactivate" proposed s5(3).

New section 5(3) was introduced to deal with unrelated issues relating to non-discrimination, and in particular, was targeted at eight specific tax treaties. Each of these treaties is given force of law by s5(1), and (presumably) as a result, proposed s5(3) only applies to "operation of a provision of an agreement provided for by subsection (1)".

Whilst most of Australia's tax treaties are given force of law by s5(1), a number of other treaties are given force of law by other provisions, such as (for example) s11K which gives force of law to the tax treaty with Ireland.

It is submitted that to the extent that the proposed s5(3) is relied upon to give priority to the Pillar Two provisions, it will only do so with respect to those treaties given force of law by s5(1), and will not do so with respect to those other treaties given force of law by other provisions.

Amendments will be required to ensure that the intended priority to be given to Pillar Two applies with respect to all of Australia's tax treaties.

General provisions relating to GloBE Top-up Tax and Domestic Top-up Tax (new Division 127)

GIR

We note that the GIR is a standardised return developed by the GloBE Implementation Framework and that Australia will not depart from the common approach. However, we wish to highlight the considerable compliance burden faced by foreign headquartered Australian entities if the UPE is not located in a jurisdiction which has entered into a Qualifying Competent Authority Agreement (QCAA) and encourage resolution of this issue at the OECD level. As some jurisdictions (e.g., Singapore, Hong Kong, Malaysia) have deferred implementation of Pillar Two until and others have yet to commit (e.g., US, China) it is unknown whether these jurisdictions will have the necessary agreements in place in order to execute the exchange of information. However, absent the application of the UTPR, which will not take effect until 2025, Australia will not generally have an ability to collect top-up tax in respect of the headquarter jurisdiction (e.g. unless it has subsidiaries located in that same jurisdiction). It therefore seems unnecessary from a practical perspective to collect the information beyond the basic corporate group information (i.e., the information required to perform the ETR computations), unless a GloBE parent entity is located in Australia. Whilst the GIR filing would not be required until 30 June 2026 at the earliest, we highlight this as a concern for Australian entities as it relates to the significant data collection exercise which may be required if an Australian entity has an obligation under subsection 127-5(3)(b)(iii) to collect data relating to group members in which they have no controlling interest.

Given the Australian subsidiary in these circumstances has minimal ability to access to data we submit that it is inappropriate for failure to lodge penalties be applied to the Australian entity and instead inter-governmental co-

ordination of and through the QCAA network should be prioritised. Similarly, we submit that, in response to Explanatory Memorandum paragraph 3.33, an Australian entity should not be subject to penalties if a foreign government agency fails to exchange with Australia within the required time frame, as this is beyond the Australian entities' control. Penalties for false and misleading statements made in relation to foreign entities are also not appropriate to impose on Australian entities for the same reason.

AGTR

We note the Explanatory Memorandum refers to the AGTR as forming the basis for the assessment of the top-up tax and submit that this should mean that the AGTR should be limited to information that is not already contained in the GIR. Specifically, as the GIR (per July 2023 release) includes the GloBE computations and top-up allocation and attribution by entity where a top-up tax exists (in Part 3 of the GIR), we submit that the AGTR could be designed to cross-reference to such information to minimise the compliance burden on groups, without requiring duplication or significant further information beyond what is contained in the GIR.

We note that many GloBE parent entities may rely on the QDMTT Safe Habour in respect of subsidiary or group jurisdictions. Clear guidance regarding which countries are considered to have a QDMTT should be provided, noting this is understood to be developed through a global peer review process, for the purposes of completing the AGTR.

It is understood that the mechanism for filing and collection under the UTPR will be developed at a later stage and we highlight that the AGTR scope in subsection 127-10(2) to GloBE parent entities would require amendment to accommodate the UTPR.

DMT Return

In order to meet the Administration Standard set out in OECD guidance of July 2023 the DMT is required to be subject to the same ongoing monitoring process as the GloBE rules. An exception for the purposes of the Administration Standard is where a jurisdiction chooses not to apply the simplified jurisdictional reporting framework that is allowed up to income years beginning before 31 December 2028 (i.e., for the first 5 years), however in our view Australia should adopt this compliance saving measure for the DMT. Under the simplified jurisdictional reporting framework entities are not required to report all adjustments to FANIL, current tax expense or deferred tax expense on an entity by entity basis and all adjustments can be reported on a net basis, provided no top-up tax liability arises in the jurisdiction or a top-up tax arises but does not need to be allocated on an entity by entity basis.

This simplified jurisdictional reporting framework should be available to Australian GloBE located entities in respect of the DMT and the DMT Return should reflect this accordingly, enabling groups to report data on a net basis and without detailed adjustments being reported where there is no DMT liability arising.

Furthermore, a single entity DMT return filing should be available at the election of a head company of a consolidated group or MEC group that makes an election under Article 3.2.8 of the OECD Model Rules (Section 3-185 of the Taxation (Multinational – Global and Domestic Minimum Tax) Rules 2024). In this case, and in response to Explanatory Memorandum paragraph 3.4.1, subsidiary members of a tax consolidated group (or MEC group) should not be required to lodge a DMT Return.

Combining the above points, where multiple tax consolidated groups are present in Australia that are within the same 'Applicable MNE Group', each tax consolidated group could prepare a DMT return on a consolidated basis (provided an election is made under section 3-185 of the Rules) and, if there is no DMT top-up tax liability, the data points could be aggregated as between the tax consolidated groups and reported in on a net basis per the simplified jurisdictional reporting framework, also at the election of the Australian local entities.

Consolidated groups

Subdivision 127-C applies if an entity is a member of a consolidated group at the end of a Fiscal Year and is also a member of an Applicable MNE Group and is GloBE located in Australia. We submit that Subdivision 127-C should also extend to members of a MEC group, whose Australian income tax treatment mirrors that of tax consolidated groups.

Clarification is required in respect of the note to section 127-40 as it appears to suggest that an entity remains part of a GloBE consolidated group even if the entity later leaves the consolidated group. We query whether it is intended for a head company of a consolidated group to remain liable for GloBE consolidated amounts inclusive of GloBE amounts for entities that have left the group, irrespective of whether they remain part of the same Applicable MNE Group?

Other administrative provisions - Dispute resolution mechanisms

We understand that OECD work on tax certainty and a clear international dispute framework for instances of double taxation arising under the GloBE rules is ongoing. This is essential as it is difficult to see how the existing treaty framework and international dispute mechanisms like a mutual agreement procedure (MAP) or arbitration via tax treaties will apply to the GloBE rules. This is because MAP provisions in tax treaties are generally limited to disputes involving 'taxation not in accordance with' a relevant treaty provisions. Thus, the traditional international dispute resolution mechanisms may not be sufficient.

Deloitte.

Appendix C: Consultation paper

Question 1: Do you agree with the proposed policy positions? If not, please propose an alternative and the reasons why

We agree with the proposed policy positions except in relation to:

- The ongoing application of the targeted integrity rules contained in Subdivision 832-J of the ITAA 97, which is a rule that specifically operates by virtue of a low taxed outcome (10% or less) in a foreign jurisidiction. We concur with the policy rationale cited by Treasury in the Consultation Paper that the hybrid mismatch rules in Division 832 should continue to operate even where a foreign jurisdiction imposes global or minimum taxes because the rules in essence target different tax treatment of arrangements whereas global and domestic minimum taxes address the shortfall of corporated taxes, but this policy statement is not accurate in respect of Subdivision 832-J.

  Subdivision 832-J is indeed an extension beyond the recommendations of the OECD BEPS Action 2 Report and as noted in the Explanatory Memorandum to its introduction was designed to "prevent the effect of the hybrid mismatch rules to neutralise double non-taxation outcomes from being compromised by multinational groups using interposed conduit type entities that pay effectively no tax to invest into Australia, as an alternative to investing into Australia using hybrid instruments or entities." (paragraph 1.351 Explanatory Memoradum, Treasury Laws Amendment (Tax Integrity and Other Measures No. 2) Act 2018). In this way it should be a deterrent to entering into alternative structures to hybrid mismatch arrangements, not a unilateral measure that takes precedence over foreign taxation. This is recognised in the fact that subsection 832-725(4) currently effectively switches off the integrity rule where the CFC rules, including foreign equivalent CFC rules, apply to the payment in question.

  If foreign global and domestic minimum taxes are not taken into account the application of the integrity rule in combination would result in global double taxation which would be inconsistent with the policy of the hybrid mismatch rules and potentially be contrary to the agreed rule order agreed to by the Inclusion Framework for the global minimum tax rules.

  We submit that the anticipated amendment to section 832-130 of the ITAA 97 to ensure that foreign global and domestic minimum taxes are disregarded for the purposes of Divison 832 should not apply in the context of Subdivision 832-J. This could be achieved via an amendment to subsection 832-725(1A), which reflects a similar distinction between the core hybrid mismatch rules and the integrity rule in relation to taxes impsed under foreign municipal and state tax regimes.

- The allowance of a notional allowable deduction for taxes paid under an Income Inclusion Rule or Undertaxed Profits Rules where the attributable taxpayer is not part of the Applicable MNE group. That is, there may be instances in which an Australian attributable taxpayer is not a Constituent Entity (including parent entity) of an Applicable MNE Group (e.g. an Australian superannuation fund) that accounts for its interest in a foreign MNE Group under the equity method as an 'investment entity' pursuant to applicable accounting standard.

  In this situation the Treasury view cited in the Consultation Paper that recognition of these taxes as a section 393 deduction would lead to circularity is not accurate as the CFC taxes are not taken into account in the GloBE computations due to being imposed on an entity outside the MNE Group. Therefore to not allow a section 393 deduction for an Australian attributable taxpayer in this circumstance may put such Australian investors at a competitive disadvantage.

- In relation to foreign hybrid entities within the meaning of Division 830 of the ITAA 97 there are certain circumstances where flow through taxation treatment is at odds with the imposition of the GloBE top-up tax. For instance, where an Australian taxpayer has at least a 50% interest in a foreign hybrid entity which is equity accounted for, the JV rules in Article 6.4 of the OECD Model Rules may apply to subject some or all of the GloBE income of the foreign hybrid entity to the IIR top-up tax in Australia. This is despite the Australian taxpayer already being subject to income tax on their share of income through Division 5 of the ITAA 36 (by virtue of Division 830 of the ITAA 97), because the GloBE rules do not allocate taxes paid by an entity outside the Applicable MNE Group to the JV. In this situation we submit that the IIR top-up tax liability should be creditable against the Australian income tax liability arising via Division 5 of the ITAA 36 to alleviate the double taxation of the same amounts.

Question 2: Do you agree with the approaches outlined? If not, please indicate your suggested approach.

We agree with the approaches outlined in the Consultation Paper although we submit that clarity could be provided as to the meaning of 'in respect of amounts included in notional assessable income' in section 393 of the ITAA 36 in terms of the application of a foreign domestic minimum tax. In particular, we submit that if amounts are included in GloBE income of a CFC and are of the same type of income included in notional assessable income there could be a deeming provision that treats GloBE income of a CFC as an amount included in notional assessable income for the purpose of section 393 of the ITAA 36 to ensure that uncertainty and complexity surrounding exact reconcilation of book to tax income within the CFC rules is not required.

We also note that section 393 of the ITAA 36 requires tax to be "paid by the eligible CFC", which may require amendment or clarification to cater for situations where a foreign jurisidiction enables a domestic tax to be paid by another constituent entity.

Given the expected timing of the payment of a foreign domestic minimum taxes will be after the lodgment of an Australian tax return that includes CFC income we also submit that there may be a need to address this timing difference administratively.

Question 3: Do you consider there are any other significant interactions that should be considered? If so, how should they be addressed?

We believe the following additional matters should be considered in light of Australia's global minimum tax rules:

- The intangibles integrity measure announced as part of the multinational tax integrity package in the October 2022-2023 Budget remains in exposure draft form (Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions) in which a "low corporate tax jurisdiction" is defined as:

  960-258 Low corporate tax jurisdictions

  (1) A foreign country is a ***low corporate tax jurisdiction*** if:
  (a) the rate of corporate income tax under the laws of that foreign country is:
  (i) less than 15%; or
  (ii) nil; or
  (b) the foreign country is determined under subsection (4).

  The stated policy of this measure is said to introduce an anti-avoidance rule designed to deter SGEs from avoiding income tax by structuring arrangements so that income from exploiting intangible assets is derived

in a jurisdiction where no or low corporate tax rates apply. The rate of 15% reflects what is internationally considered a minimum level of tax and this appears to be recognised in the intangibles integrity exposure draft provision in subsection 26-110(4):

> *Effect of certain rates and inclusions on status of income*
>
> (4) For the purposes of subparagraph (2)(c)(ii):
>
> (a) in determining whether a foreign country is a *low corporate tax jurisdiction, have regard only to the rate of corporate income tax in respect of the income of an entity that is a *significant global entity; and
>
> (b) treat income derived in a foreign country that is a low corporate tax jurisdiction as being derived otherwise than in a low corporate tax jurisdiction to the extent that the income:
>
> (i) is, or will be, *subject to foreign income tax at a rate of 15% or more; or
>
> (ii) would be subject to foreign income tax at a rate of 15% or more if subsection 832-130(6) and paragraphs 832-130(7)(d) and (e) were disregarded; or

We submit that if the intangibles integrity measure were to proceed per the above exposure draft, an amendment to the meaning of "subject to foreign income tax", which is defined in Division 832 of the ITAA 97 would be necessary to have regard to a foreign domestic minimum tax. This is necessary to respect the internationally agreed rule order of global minimum taxes and prevent double taxation, similar to the issues described above in relation to the hybrid integrity rule.

More generally, we submit that consideration ought to be given to the need for the proposed intangibles integrity measure in light of the proposed commencemnent of the Pillar Two regime, and in any case, the Government should clarify whether it intends to proceed with the intangibles integrity measure.

- There could be circumstances where entities within an Applicable MNE Group make intra-group payments to one another to fund or compensate for outcomes under a global or domestic minimum tax. For example, a GloBE parent entity located in Australia that suffers top-up tax under section 4 of the Assessment Act in respect of the GloBE income of a foreign subsidiary may receive an intra-group payment to fund its liability. Also, separate entities in Australia (not part of the same consolidated group) may make intra-group payments to equalise the blending of attributes under the GloBE rules.

  In our view such payments should not give rise to income tax consequences on the basis that they are merely funding tax payments, and they should also not be included in GloBE income computations as to do so generate circularity in the calculations. To the extent not already being considered by the OECD we encourage that this issue is raised and clarified by future OECD guidance and that any such payments are treated as tax neutral for Australian income tax purposes.