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Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
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Via email: economics.sen@aph.gov.au

Dear Committee,

Inquiry into the Taxation (Multinational—Global and Domestic Minimum Tax) Imposition Bill 2024 [Provisions] and related bills

We are writing to you with respect to the Committee's inquiry into the Taxation (Multinational—Global and Domestic Minimum Tax) Imposition Bill 2024 [Provisions] and related bills.[1] As the representative of over 150 large corporates that operate across 22 industries, the Corporate Tax Association (**CTA**) welcomes the opportunity to provide further commentary and recommendations regarding Australia's implementation of the OECD Pillar Two Model Rules (**Model Rules**).

We acknowledge the importance of the OECD in its role as a multilateral forum for progressing changes to global tax laws and Australia's ongoing support and commitment to implementing these rules in our domestic legislation. The introduction of these Bills (herein referred to as the **Primary Legislation**) in the House of Representatives and the Senate's referral of the Primary Legislation to this Committee represents a significant milestone in this process.

To support the Committee's inquiry into the Primary Legislation, this submission sets out key matters and recommendations that we believe warrant the Committee's consideration.

In our view, our recommendations strike an appropriate balance between ensuring Australia's regime is a qualifying regime and that ATO and taxpayer resourcing and compliance costs are not disproportionate to the revenue that this measure is expected to raise. This approach is reflective of Treasury's Impact Analysis which estimated that 97% of companies will be required to incur significant implementation compliance costs but not pay any extra tax under this regime.

In our view, it is also important that the Committee takes into consideration the Subordinate Legislation as part of this inquiry. We understand that the Subordinate Legislation will be a disallowable Legislative Instrument and not subject to a full parliamentary process. As such, we also provide some commentary about key issues with the Subordinate Legislation.

[1] The Taxation (Multinational—Global and Domestic Minimum Tax) Imposition Bill 2024 will herein be referred to as the '**Imposition Bill**'; The Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024 will herein be referred to as the '**Assessment Bill**'; The Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) Bill 2024 will herein be referred to as the '**Consequential Bill**'.

Commencement date of Australia's Pillar Two legislation

RECOMMENDATION:
The Committee should request detailed information as to the proposed timeline for the introduction of the Subordinate Legislation.

As a package, the Primary Legislation applies from the day after the Assessment Act receives Royal Assent. As outlined in the Explanatory Memorandum (**EM**) in paragraph 1.6, each Bill must be enacted and form a collective for the Primary Legislation to commence.

Whilst we understand that legislation must first pass before the time associated regulations and legislative instruments can be tabled in parliament and subsequently be registered on the Federal Register of Legislation, further clarity is needed as to when the government intends to table the Subordinate Legislation. This timing is important as Australia's Pillar Two Rules are expected to apply with effect to fiscal years commencing on or after 1 January 2024.

The Subordinate Legislation is integral to the effective operation of Australia's Pillar Two legislation as it contains the mechanisms for the computation of Top-up Tax. Therefore, it becomes problematic if the Subordinate Legislation is not passed in a timely and somewhat parallel manner to the Primary Legislation. Not only would it be difficult to comply with the Primary Legislation, but taxpayers would also not have the certainty needed to make relevant disclosures in financial statements, build global data management systems, and develop internal processes for global compliance.

For example, for any public company subject to the rules with a reporting period ending before the enactment of the Subordinate legislation, misalignment in passage may distort how it reports the impact of Australia's Pillar Two Rules in its financial accounts. This would not foster tax transparency and comparability between Multinational Entities (**MNEs**) in the scope of the Model Rules in different jurisdictions and between different reporting periods due to the accounting rules only allowing consideration of tax laws that are enacted or substantively enacted.

To provide certainty, it is recommended that the Committee request detailed information as to the proposed timeline for the introduction of the Subordinate Legislation.

Commissioner requiring the GloBE Information Return (GIR) to be lodged with the ATO when it has already been lodged in another jurisdiction

RECOMMENDATION:
The consequential amendments of subsections 127-20(4) to (6) of the Tax Administration Act 1953 (TAA) in the Consequential Bill should be removed.

We recommend that the consequential amendments of subsections 127-20(4) to (6) of the *Tax Administration Act 1953* (**TAA**) in the Consequential Bill be removed. In our view, these provisions and the corresponding paragraphs in the EM are at odds with the OECD GIR guidance and may put at risk Australia's qualification.

Guidance published by the OECD states:[2]

> *"Jurisdictions with taxing rights under the GloBE Rules are provided with the sections of the GIR that relate to the ETR and Top-up Tax computation, allocation and attribution for those jurisdictions in respect of which they have taxing rights.*
> *…*
> *The tax administration with which the GIR is filed centrally will use the MNE Group's designations as the basis for disseminating the GIR information. However, the MNE Group may also opt for the whole GIR to be exchanged with all implementing jurisdictions where it has CEs.*
> *…*
> *[T]he requirement for each CE to file a GIR with each tax administration is removed when the UPE or a Designated Filing Entity files the GIR with the tax administration of the jurisdiction where it is located and there is a Qualifying Competent Authority Agreement in effect by the filing deadline to exchange GloBE information with the jurisdiction of the CE."*

In our view, Australian taxpayers should not be held responsible for potential interaction failings between tax administrators. Moreover, it is punitive and administratively burdensome to also provide the Commissioner with powers to impose penalties where an impacted taxpayer fails to comply with a lodgment request that is not required by the Australian Taxation Office (**ATO**).

We observe that Australia is only entitled to obtain sections of the GIR relevant to Effective Tax Rate and DMT calculations where Australia may have a taxing right.[3] The OECD Model Rules, associated commentary, and administrative guidance currently published do not give the Commissioner the power to override the Inclusive Framework.

Lodgements of Domestic Minimum Tax (DMT) returns by unincorporated joint ventures

RECOMMENDATION:
The Designated Local Entity for the main group should have the option of lodging the DMT Return on behalf of an Unincorporated Joint Venture, along with all the other returns within its purview.

Further guidance in the EM should be added to paragraph 3.56 to provide the practical application of section 127-55 contained in the Consequential Bill. Our understanding of the current EM guidance suggests that unincorporated Joint Venture (**UJV**) participants will be required to jointly lodge a DMT Return for that UJV in its own capacity. A UJV is essentially a contractual arrangement whereby participants agree to co-ordinate their activities, managed by a UJV operator (who is ordinarily one of the UJV participants), but the UJV participants do not share revenue and have separate part ownership in underlying assets.

UJVs are not normally subject to the Australian Rules in their own capacity, rather each participant accounts for its economic share in the arrangement. As such each participant's share is reported in its Ultimate Parent Entity's income tax return, with the attendant profits/losses included in each participant's accounts per the accounting standards (IFRS 11 or its equivalent). That is, they are not equity accounted.

[2] Paragraphs 19 to 21, and paragraph 32, 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.
[3] Ibid.

Furthermore, we note as UJVs don't hold assets, receive income jointly, or pay income tax, but rather the individual participants do. Consequently, there will be no income or expense with DMT being nil in any event.

Therefore, we recommend that the Designated Local Entity for the main group should have the option of lodging the DMT Return on behalf of the UJV, along with all the other returns within its purview. This could be achieved in a similar manner to which we are seeking for dormant Constituent Entities to be excluded from DMT lodgement obligations.

Consideration should also be given to extending this flexibility to incorporated JVs given that in their own right they would not typically be subject to the Rules unless their Ultimate Parent Entity is. The same flexibility should be given to incorporated JVs.

Joint and several liability

RECOMMENDATION:
Joint and several liabilities should be limited to Australian group entities. Adopting a simple method for dealing with joint and several liability on exit similar to that which New Zealand has included within its final Pillar Two legislation should be considered.

Noting that any entity can lodge the GIR so long as it is a Designated Filing Entity, consideration should be given to the Australian drafting to ensure who can lodge a GIR and pay GloBE amounts is not limited. The introduction of the concept that all Pillar Two liabilities are to be joint and several liabilities of any entity within the taxpayer's Pillar Two group, including non-Australian entities, creates a significant administrative burden on groups with an in-scope Australian entity.

This is different from the approaches being developed and/or adopted in other comparable jurisdictions. Bulgaria, Czech Republic, France, Finland, Greece, Romania, Hungary, Slovakia, Japan, Korea, Malaysia, Vietnam do not have a joint and several liability concept whilst Austria, Belgium, Croatia, Germany, Italy, Luxembourg, Switzerland, Slovenia, Spain, Poland (UTPR), UK, NZ, South Africa, Canada, Ireland (after 12 months) have joint and several secondary liability but only for entities located in the jurisdiction of enactment.

Australia's current approach is one of the most onerous and we query whether this is proportional to the risk given Treasury's forecast of the total tax at stake, notwithstanding the likelihood of the need to collect only a very minor proportion of this via a secondary liability mechanism.

This administration burden is likely to impact the efficient operation of several industries such as the financial markets as well as mergers and acquisitions when an MNE that is subject to the rules either acquires or disposes of one or more entities. The impact of potential secondary liabilities extending to non-Australian entities will require wide-ranging due diligence to be carried out with respect to potential secondary liabilities arising from activities completely separate from those that may give rise to the primary liability, even when a non-Australian entity is sold by a group that has some nexus to Australia. Impacted taxpayers may need to enter into intra-group arrangements to deal with how any such secondary liabilities would be funded for accounting purposes.

The Primary Legislation also does not provide a mechanism to address some of the aforementioned concerns by adopting a "clear exit" mechanism for entities leaving the group. Clarity should also be

provided regarding precisely how related parties can be held liable for the payment of other related parties' GloBE amounts (e.g. joint and several liability). This can be achieved by limiting any joint and several liability to only Australian group entities and adopting a simple method for dealing with joint and several liability on exit similar to that which New Zealand has included within its final Pillar Two legislation.

We also submit that further consequential amendments will be needed to Division 721 of the *Income Tax Assessment Act 1997* (**ITAA 1997**) (dealing with tax consolidated groups), specifically the table in section 721-10(2), to reflect whether or not a GloBE amount (within the meaning of the Assessment Bill) is considered a group liability. If it is intended that GloBE amounts are excluded from tax-sharing agreements, we suggest that a drafting note be added to section 721-10(2) to explicitly state this exclusion from the table of tax-related liabilities. Any inclusion of GloBE amounts within Division 721 is limited to the members constituting a tax consolidated group or MEC group, as tax-sharing agreements cannot be validly extended to related non-members of those groups.

Transitional penalty relief

RECOMMENDATION:
It should be stated in the EM to the Consequential Bill that Australia intends to follow the common understanding on transitional penalty relief and that it is expected that the ATO should administer the law consistent with this common understanding.

The EM to the Consequential Bill makes the following statement about transitional penalty relief:

> *"3.103 The OECD published the Safe Harbour Rules on 20 December 2022, which outlined a common understanding on transitional penalty relief for implementing jurisdictions. This included that tax administrations should consider not applying penalties or sanctions in connection with the filing of the GloBE Information Return during a Transition Period where a tax administration considers that an MNE Group has taken "reasonable measures" to ensure the correct application of the GloBE Rules. The approach also contemplated that in many cases jurisdictions already provide, as a matter of law or administrative practice, for penalty relief in accordance with the common understanding."*

This statement does not appear to provide comment on Australia's position as to whether taxpayers can expect the law to be enacted and administrated in such a manner as to provide transitional penalty relief consistent with this common understanding.

We recommend that the above statement be expanded/clarified to state that Australia intends to follow the common understanding on transitional penalty relief and that it is expected that the ATO will administer the law consistent with this common understanding. To the extent that the current discretions available to the ATO around enforcement of Australia's tax penalty regime (which could apply in a Pillar Two context) are not sufficient to empower the ATO to administer the law in this manner, amendments should be made to allow that discretion.

Foreign income tax offsets and controlled foreign companies

RECOMMENDATION:
*The EM should make it clear that a foreign income tax offset (**FITO**) should be available for Qualifying Domestic Minimum Top-up Tax (**QDMTT**) paid that is referable to the attributable profits of a controlled foreign company (**CFC**), no matter which entity is liable to pay or actually pays the QDMTT tax.*

A foreign jurisdiction's QDMTT is a foreign tax for the CFC regime under Australian rules in Division 770 of the ITAA 1997. As such taxpayers will be entitled to a credit when determining their Australian tax liabilities should the necessary tests be satisfied. In our view, the Explanatory Materials should make it clear that a foreign income tax offset (**FITO**) should be available for QDMTT tax paid that is referable to the attributable profits of a CFC, no matter which entity is liable to pay or actually pays the QDMTT tax.

We also observe that further consideration needs to be given to timing issues associated with the levying of a QDMTT sometime after the relevant income year and the legislative drafting of Division 770 which provides that a FITO is only available if foreign tax has been 'paid'. Foreign jurisdiction QDMTT liability may not be payable until sometime after the relevant income year, unlike general corporate taxes which may be paid in instalments throughout a year. For example, in Vietnam, the QDMTT is payable nine months after year-end.

Division 770 should be amended to ensure that a foreign income tax offset is available in circumstances where the minimum tax liability is paid at a time after the end of the relevant income year.

Interaction with Division 832 - Hybrid mismatch rules

RECOMMENDATION:
Further and more detailed consideration needs to be given to the interaction with Australia's hybrid mismatch rules once the OECD anti-arbitrage guidance for the main Pillar Two Rules is released to ensure that inequitable outcomes, such as double tax for having to back out deductions, are mitigated.

The OECD has publicly announced[4] that it will develop Administrative Guidance on hybrids that will ultimately form part of the Australian Rules (as a result of subsections 3(1) and (4) of the Assessment Bill). For example, the anti-arbitrage rules outlined in the December 2023 Administrative Guidance are broader than the Australian anti-hybrid law in some cases. This includes specific scenarios where a lender has carried forward tax losses and these losses are utilised through interest income earned from a related party borrower.

As such, further and more detailed consideration needs to be given to the interaction with Australia's hybrid mismatch rules once this OECD anti-arbitrage guidance for the main Pillar Two Rules is released to ensure that inequitable outcomes are mitigated, such as double tax for having to not claim tax deductions.

[4] See Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), December 2023 page 19, paragraph 33.

That said, at present, we are concerned with the conceptual approach taken in the Consequential Bill that Australia's hybrid mismatch rules will continue operating even if a foreign jurisdiction imposes global or domestic minimum taxes. This is because it will give rise to an inequitable outcome for taxpayers in the form of double taxation or, in certain circumstances, excessive taxation.

This is highlighted by examples where a deduction for a payment is incurred in Australia and in the recipient jurisdiction the income is not subject to tax under its ordinary domestic provisions but is taxed under an Income Inclusion Rule (**IIR**) or QDMTT at 15%. In these circumstances, notwithstanding the income is subject to a 15% tax, the policy is proposing to still enliven Australia's anti-hybrid rules by denying a deduction for the payment in Australia. This would lead to a double tax or tax being imposed on the arrangement at 45% (30% corporate tax rate plus 15% QDMTT). This is clearly inappropriate.

For example, an Australian resident company Parent Co has two subsidiaries. Sub A is located in Australia (the same as Parent Co) and Sub B is located in Jurisdiction B. Jurisdiction B is a low-taxed jurisdiction. Sub A and Sub B enter into a financial instrument. The financial instrument is treated as debt for Australian tax purposes and equity in Jurisdiction B. The payment of interest on the debt is deductible in Australia and is not included in the foreign recipient's income, giving rise to a hybrid financial instrument mismatch. Under the Australian hybrid mismatch rules, the Australian payment will not be deductible to the extent that the paid amount is not included in the non-resident recipient's income.

Given Jurisdiction B is also a low-taxed jurisdiction under the Pillar Two rules, the Top-up Tax will be payable by Parent Co under Australia's IIR. As such, the same payment will effectively be taxed twice – both under the hybrid mismatch rules (in the form of a denied deduction) and under Pillar Two (in the form of Top-up Tax).

Subordinate Legislation

RECOMMENDATION:
There are priority matters in the Subordinate Legislation that require the Committee's consideration as part of the review of the Primary Legislation. In the absence of this, a review of the Primary Legislation would be incomplete.

We are concerned that the latest Exposure Draft of the Subordinate Legislation that was subject to public consultation failed to address several matters specific to Australian circumstances. Whilst we appreciate that the Subordinate Legislation is not strictly within the terms of reference for this inquiry, it is a necessary component of the total package of Australia's implementation of the Model Rules. As the Subordinate Legislation is a Disallowable Legislative Instrument that may not necessarily be subject to a full parliamentary process like the Primary Legislation, we are of the view that the Committee should also consider the Subordinate Legislation as part of this inquiry.

The Model Rules are complex and were designed to apply in a global environment and cannot address all the nuances of domestic tax laws in various jurisdictions. As such, the OECD has emphasised taking a 'common approach' to the adoption of Pillar Two and where implemented, should be administered in a way that "is consistent with the Model Rules". Countries such as Belgium, Croatia, France, Germany, Greece, Hungary, Netherlands, Romania, Slovenia, Spain, and

Switzerland have used this flexibility to adapt the Model Rules to fit within their domestic frameworks without disturbing its intent.

For Australia, some adaption will be needed to ensure the Model Rules can operate harmoniously alongside Australia's domestic law without disturbing the intent and outcomes sought under the Model Rules or putting at risk Australia's qualification. One such example in an Australian context is Australia's tax consolidation regime (including Multiple Entry Consolidated Groups).

As such, we draw the Committee's attention to some priority matters that require further consideration in the Subordinate Legislation:

Implementation of permanent safe harbours

We recommend that there is scope for the government to work with the OECD Inclusive Framework to give priority to implementing permanent safe harbours to provide in-scope MNE groups with greater certainty on the degree of Pillar Two compliance that will be required following the end of the availability of the Transitional Country by Country Reporting (**CbCR**) Safe Harbour. As a starting point, we recommend that the OECD consider keeping the Transitional CbCR Safe Harbour as a permanent safe harbour or at least extend the period of the Transitional CbCR Safe Harbour for at least another two financial years given the different pace at which countries are announcing and implementing Pillar Two into their domestic law.

While less preferable, an alternative would be to implement the Simplified Calculations Safe Harbour which was outlined in the OECD's guidance document "Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)" issued on 15 December 2022.

The "Simplified Calculations Safe Harbour Framework" is slated to be included as part of agreed administrative guidance to be issued at a later date. MNE groups that have constituent entities in jurisdictions that operate under a high statutory corporate tax rate regime of at least 25% should pass the "effective tax rate" test, which is one of the three available simplified calculations.

We recommend that the government via Treasury engage with the OECD to work through a suitable solution for a permanent safe harbour. In our view, keeping the Transitional CbCR Safe Harbour as a permanent fixture in the Pillar Two regime would be appropriate and efficient, and still achieve the Pillar Two objectives.

Ensure Australia's tax consolidation rules are appropriately reflected in the Australian Rules

We understand that a large focus of the design of Australia's Pillar Two Rules has been to align as closely as statutorily possible with the Model Rules. That said, the approach has not taken into consideration the flexibility of adapting the Model Rules so that they operate harmoniously with Australia's domestic tax laws without disturbing the intent and outcomes sought under the Model Rules.

Administrative Guidance published in February 2023 indicates that the *"QDMTT must be consistent with the design of the GloBE rules"* and there is an acknowledgement that some degree of customisation in each jurisdiction is expected where it can be justified in the context of the

jurisdiction's domestic tax laws. In our view, taking an approach that is consistent with the GloBE Rules focuses on the outcome of the application of the GloBE Rules rather than on the administrative machinery that supports the outcome. Many jurisdictions have taken the opportunity to make minor adjustments as needed.

This approach should be adopted having regard to Australia's tax consolidation rules. Incorporating tax consolidation, in our view, would not deviate from the OECD's position on a 'common approach' to the Model Rules and ensuring that is administered in a way that 'is consistent with the Model Rules'.

In our view, the OECD does provide a sufficient degree of flexibility to adapt the Model Rules on a 'needs' basis. We submit that some adaptation is needed in an Australian context. It is also important that the Australian Rules will apply to a Multiple Entry Consolidated (MEC) group which is different from a consolidated group.

Use of local financial accounts

The Domestic Top-up Tax refers to the use of local financial accounting standards (section 2-35 of the Rules) and local currency (section 2-40 of the Rules). In our view, this would appear to be inconsistent with paragraph 3.4 of the Explanatory Statement, and it is unclear as to why the current draft includes these provisions in the Australian Rules.

We recommend that taxpayers should be able to use the Ultimate Parent Entity's financial statements and currency under the QDMTT with an ability to take into account elimination accounts if they are consistently / reliably traced to a specific Constituent Entity so to be consistent with the IIR.

Australian-headquartered MNEs will prepare their calculations based on local financial accounting standards so it would seem unnecessary to include this specific requirement.

Further, many MNEs with foreign Ultimate Parent Entities have already commenced building global solutions to address the required compliance needs of the implementation of the OECD Pillar Two Model Rules across multiple jurisdictions. Requiring these groups to modify or build bespoke systems to undertake the Domestic Top-up Tax calculations using local financial accounts adds an unnecessary additional compliance burden on taxpayers for a regime that the Government recognises will generate minimal revenue.

As such, we recommend that sections 2-35 and 2-40 be removed.

Interaction between deferred tax assets (DTA) and secondary taxes

We observe that there is a significant unresolved issue with how the Model Rules require the recasting of DTAs for secondary taxes and in particular, for the resources sector. This issue is not just limited to the Petroleum Resource Rent Tax (**PRRT**) but where any secondary tax contains an indexation concept – for example; the Petroleum Revenue Tax of the United Kingdom and the Additional Profits Tax of Papua New Guinea.

Specifically, recasting DTAs for secondary taxes in Adjusted Covered Taxes can cause unintended, adverse outcomes through a distortion of the GloBE Effective Tax Rate (**ETR**). For example, recasting

DTAs to include the indexation on carry forward expenditure in the GloBE ETR (whether for PRRT or other secondary taxes), may cause top-up tax due to the quantum of historic expenditure balances (even though these balances are not recognised for financial statement purposes).

This outcome could arise notwithstanding an entity's GloBE ETR may be above 15% when calculated solely on primary taxes (i.e. corporate income tax). This would result in an entity being taxed at an effective rate of higher than 30% in some circumstances, despite being subject to both primary and secondary taxes. In effect, Australia may gain taxing rights over other country's resource sectors.

Accordingly, we believe the result of this interaction with secondary taxes is inconsistent with the intent and outcomes sought under the Model Rules. As such, the Committee should recommend the recasting of DTAs in such circumstances is not required. Further clarification on this issue from the OECD is also warranted.

Foreign currency translation

Given the complexities involved in the application of the foreign currency translation provisions, examples should be provided to explain the application of "Asymmetric Foreign Currency Gains or Losses" in the Explanatory Statement to the Subordinate Legislation. As part of these examples, we think that it would also be beneficial if the Committee request that Treasury (and the ATO) indicate where unintended permanent differences arise as a result of top-up tax being paid under the QDMTT, these permanent differences should be disregarded.

We note that the July 2023 Tranche of administrative guidance provides some commentary on foreign currency translation and that more guidance is expected. Further consideration should also be given to the administrative impacts of adjustments that may need to be made after an impacted entity has lodged an Australian GIR, DMT Return and where relevant, a GIR, prior to updated OECD administrative guidance being released.

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Should you have any questions or if you wish to discuss this matter, please do not hesitate to me at sstaples@corptax.com.au or on 0403 152 157.

Yours sincerely,

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