

Director
Pillar Two Unit
Corporate and International Tax Division
Treasury
Langton Cres
Parkes ACT 2600

By email: contact.internationaltax@treasury.gov.au

Dear Director,

International taxation – global and domestic minimum tax – subordinate legislation

The Tax Institute welcomes the opportunity to make a submission to the Treasury in respect of its consultation on the exposure draft Taxation (Multinational – Global and Domestic Minimum Tax) Rules 2024 (**draft Regulations**) and accompanying explanatory statement (**draft ES**).

In the development of this submission, we have closely consulted with members of The Tax Institute with expertise in the area, including our National Large Business and International Technical Committee, and our Pillar Two Working Group, to prepare a considered response that represents the views of the broader membership of The Tax Institute.

The draft Regulations contain the bulk of the detail of the implementation of the Organisation for Economic Co-operation and Development's (**OECD's**) Inclusive Framework and Global Anti-Base Erosion Model Rules (**Model Rules**). This is a complex and lengthy regime that will impose significant burdens on taxpayers, tax advisers and tax administrators.

The Tax Institute is of the view that further clarification and guidance is needed on the draft Regulations and draft ES regarding:

- the application of the acquisition rules to single entity acquisitions;
- interactions with regimes specific to Australia's tax system;
- the application of the pension rules to defined benefit funds;
- the enactment dates of the draft Regulations and primary legislation; and
- whether the latest OECD commentary and agreed administrative guidance has been incorporated into the draft Regulations.

We also consider it important to ensure that a contemporaneous post-implementation review is undertaken to address the complexities and unintended consequences that are likely to arise from Australia's adoption of the Model Rules.



Our detailed response and recommendations to further improve the draft Regulations and draft ES are contained in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla, at (02) 8223 0058.

Yours faithfully,



Scott Treatt

Chief Executive Officer



Todd Want

President

APPENDIX A

We have set out below our detailed comments and observations for your consideration.

Application of acquisition rules

Feedback from our members indicates that the acquisition rules set out in the draft Regulations may result in unintended outcomes in instances involving a single entity acquisition. This may be a result of the underlying approach adopted in the Model Rules and its interaction with Australia's tax consolidation regime. For example, the provisions that allow the GloBE base to be stepped up in the case of acquisitions do not allow for single entity acquisitions. To address this discrepancy, we consider that the draft Regulations should be updated to better allow for, and reflect the tax consequences of, single entity acquisitions.

Interaction with Australian specific rules

The Tax Institute is of the view that further clarification and guidance is required regarding the interaction between the draft Regulations and tax regimes that are specific to, or contain significant nuances in, Australia. Examples include, but are not limited to:

- the treatment of research and development tax incentive (**R&DTI**) credits and offsets – in particular, we consider that clarification is required regarding whether the R&DTI offsets can be classified as non-qualified refundable tax credits under the draft Regulations and, if so, the circumstances under which these offsets are able to be 'clawed back' under Australia's DMT rules;
- the differences between the definitions used in Australia's tax consolidation regimes and the Model Rules; and
- the treatment of tax concessions provided under Australia's tax consolidations regime under the framework set out by the Model Rules.

Application to defined benefit funds

Paragraph 3.46 of the draft ES states that the adjustments for accrued pensions do not apply to amounts paid into a defined benefit fund. However, guidance from the OECD in relation to Article 3.2.1(i) of the Model Rules notes that although defined benefit funds may have different accounting principles across jurisdictions, the same underlying principle should apply to them.¹ In particular, the adjustment for accrued pension takes into account both accrued pension income and expense. Accrued pension income generally only arises with respect to defined benefit funds.

¹ OECD (2023), Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), OECD/G20 Inclusive Framework on BEPS, OECD, Paris, <https://www.oecd.org/tax/beps/agreed-administrative-guidance-for-the-pillar-two-globe-rules.pdf>, section 2.5.1, paragraph 3.

Accordingly, we consider that further guidance should be provided:

- detailing the rationale for excluding amounts paid into a defined benefit fund;
- with further examples demonstrating how the rules are intended to apply; and
- regarding the categories of superannuation funds that are likely to be impacted.

Incorporation of further OECD guidance

The OECD has regularly released updated commentary and agreed administrative guidance in relation to the Model Rules. The latest commentary was released in April 2024,² and the latest administrative guidance was released in December 2023.³ We note that the latest administrative guidance, such as the guidance concerning the transitional rules, has not been incorporated into the draft Regulations or draft ES. We consider that the draft Regulations and the draft ES should be updated to reflect the latest guidance, ensuring that they are aligned with the OECD's expectations and those of other jurisdictions.

Definitions

We consider that the terminology and definitions used in the draft Regulations and draft ES should be consistent with the approach proposed by the OECD. This will reduce potential confusion and better ensure that the DMT and UTPR operate as intended, reducing the likelihood of unintended consequences arising. We also consider that clarification should be provided in instances where discrepancies are considered necessary, or where there may be ambiguity. For example, we consider that guidance should be provided on whether an Australian superannuation fund is a 'pension fund' for the purposes of the Model Rules.

Enactment date

The Tax Institute is of the view that further clarity is required regarding the effective application of the draft Regulations and the primary legislation if they proceed through the relevant legislative processes at different times. For example, if the Bill containing the primary legislation is passed in 2024, but the draft Regulations are not passed until 2025. In such circumstances, there may be additional uncertainty for affected groups in attempting to address the required disclosures in their financial reports, noting that accounting relies on the concept of 'substantive enactment' before the consequences of any law changes are to be reflected in financial reports. While the ideal position would be for the primary legislation and the Rules to be given legal effect, i.e. 'substantive enactment', around the same time (and preferably well before the end of a fiscal year), further clarification will assist taxpayers in meeting their financial reporting compliance obligations.

² OECD (2024), Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules (2023): Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/b849f926-en>.

³ OECD (2023), Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), December 2023, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, <http://www.oecd.org/tax/beps/administrative-guidance-global-antibase-erosion-rules-pillar-two-december-2023.pdf>.

Contemporaneous post-implementation review

The draft legislation package, including the subordinate legislation, is a large and complex framework. The concepts and implementation of Pillar Two are a new and untested area for taxpayers, tax practitioners and the Commissioner of Taxation. Although consultation has been undertaken throughout the design of the implementation of Pillar Two in Australia, there are likely to be a number of issues that are only able to be identified once taxpayers are required to comply with the new obligations in practice.

As a result, we consider that a contemporaneous post-implementation review of Pillar Two is imperative. Noting the complexity and lengthy period of time before concepts can be tested, multiple contemporaneous reviews may need to be undertaken. To facilitate ongoing review, The Tax Institute supports the creation of a standing working group consisting of stakeholders from Treasury, the ATO, industry experts and professional organisations, to regularly meet, discuss and address issues as they arise.