

# SUBMISSION

Submission to Treasury —  
Global agreement on  
corporate taxation:  
addressing the tax  
challenges arising from  
the digitalisation of the  
economy

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31 October 2022

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31 October 2022

Dear Sir / Madam

**Global agreement on corporate taxation: addressing the tax challenges arising from the digitalisation of the economy**

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Treasury consultation with respect to the global agreement on corporate taxation and addressing the tax challenges arising from the digitalisation of the economy. The submission has been prepared with the support of ASFA's Tax Specialist Advisory Committee.

**About ASFA**

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3.3 trillion in retirement savings.

Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

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If you have any queries or comments in relation to the content of our submission, please contact me on (03) 9225 4027 or by email [jstannard@superannuation.asn.au](mailto:jstannard@superannuation.asn.au).

Yours sincerely

Julia Stannard  
Senior Policy Advisor

## Executive summary

ASFA is supportive of Australia's adoption of the two-pillar multilateral solution to the tax challenges from digitisation, but wish to emphasise the importance of ensuring that the Australian rules clearly reflect the intention for superannuation/pension funds and related investment and service entities to be treated as 'Excluded Entities'. If this is not the case, additional compliance costs will be incurred by funds. These will flow through to fund members and have a detrimental impact on retirement savings outcomes.

## General comments

Further to our recent submission to Treasury dated 5 September 2022 in response to consultation on multinational tax integrity and enhanced tax transparency measures, ASFA is supportive of the OECD's ongoing efforts directed towards ensuring that businesses pay their fair share of tax in the jurisdictions in which they operate. ASFA acknowledges the broader societal and economic benefits from Australia's adoption of the two-pillar multilateral solution.

Having said that, ASFA considers it critical that the rules are appropriately targeted and do not impose undue compliance costs, both on businesses that are clearly intended to be within their scope, but also on other businesses who may find themselves subject to additional financial and/or tax reporting requirements (for example, a GloBE Information Return) or for whom the determination of whether the rules apply to them involves complexity that must be reassessed on an ongoing basis.

ASFA's submission in response to the consultation paper is made in this context and effectively addresses discussion question 12, which seeks general comments or feedback in relation to the Pillar One and Two rules that should be considered by Australia in the design and implementation stage. We consider that the more specific discussion questions can be more appropriately addressed by corporate entities or bodies that act on their behalf.

### Exclusion for complying superannuation entities

ASFA's primary concern with the introduction of these rules is to ensure that they do not apply to Australian complying superannuation entities, noting that under the Model Rules, a Pension Fund is an Excluded Entity and as a result should not be subject to the GloBE (Global anti-Base Erosion) rules.

A 'Pension Fund' is defined in the Model Rules as:

- (a) an Entity that is established and operated in a jurisdiction exclusively or almost exclusively to administer or provide retirement benefits and ancillary or incidental benefits to individuals:
  - i. regulated as such by that jurisdiction or one of its political subdivisions or local authorities; or*
  - ii. those benefits are secured or otherwise protected by national regulations and funded by a pool of assets held through a fiduciary arrangement or trustor to secure the fulfilment of the corresponding pension obligations against a case of insolvency of the MNE Group; and**
- (b) a Pension Services Entity.*

A 'Pension Services Entity' is in turn defined to mean:

*...an Entity that is established and operated exclusively or almost exclusively:*

- (a) to invest funds for the benefit of Entities referred to in paragraph (a) of the definition of Pension Fund; or*

(b) to carry out activities that are ancillary to those regulated activities carried out by the Entities referred to in paragraph (a) of the definition of Pension Fund provided that they are members of the same Group.

The 'Pension Fund' definition should capture Australian complying superannuation funds, as:

- it differs from the OECD Model Tax Convention in that the reference to the fund being taxable as a separate person in the jurisdiction of formation has been removed
- the commentary to the Model Rules states (refer page 208) that this is "...to allow for Pension Funds formed in a different legal arrangement such as a trust" (which is the structure used under the Australian superannuation system).

Nevertheless, for absolute certainty, ASFA considers that the Australian domestic law definition of a 'Pension Fund' should specifically include a 'complying superannuation entity' as defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).

This should be inserted as a new paragraph (b) within the 'Pension Fund' definition, with current paragraph (b) thereof becoming paragraph (c). Within the definition of 'Pension Services Entity', the references to "...paragraph (a) of the definition of Pension Fund..." should be changed to "...paragraphs (a) and (b)...".

## Recommendation 1

### Clear exclusion for complying superannuation entities from the Pillar One and Two rules

The design of the rules should include a definition of 'Pension Fund' that specifically references the existing tax law definition of a complying superannuation entity.

## Application of consolidated revenue test to superannuation / pension funds

Whilst 'Pension Funds' are 'Excluded Entities', there is some uncertainty as to whether they might still qualify as a 'Group Entity' for the purposes of determining the consolidated revenue threshold (and therefore whether the Pillar One and/or Pillar Two rules will apply to certain MNE group members). The commentary to the Model Rules refers to alignment of this test with the threshold for reporting under the Country by Country Reporting (CbCR) regime, which would suggest that only entities which are consolidated for financial statement purposes are taken into account.

The operation of the investment entity exemption under AASB 10 means that a superannuation fund with a controlling interest in a company would not incorporate it within consolidated financial statements.

However, for the purposes of determining whether an entity is a 'Significant Global Entity' (SGE) under the Australian tax law (as distinct from a CbCR entity), the concept of a 'notional listed company group' (section 960-575 of the ITAA 1997) overrides normal accounting consolidation principles.

ASFA seeks to ensure that the Australian laws to implement Pillar One and Pillar Two do not contain consolidation rules of a similar nature to those applicable to the SGE definition, which it is submitted would not be consistent with the Model Rules.

Otherwise, it is likely to add unnecessary complexity and compliance costs for downstream investee entities to apply the revenue thresholds. For example, assuming the revenue would be based on amounts reported in financial statements, the application of the test in the context of superannuation fund accounts prepared under AASB 1056 would need to be clarified (including by confirming that contributions are not revenue). Further, the downstream investee entity would be subject to annual volatility in investment market returns - as we have seen in recent years with many large superannuation funds and related entities moving in and out of SGE status.

Particularly where the downstream investee entity is neither large nor has multinational operations in its own right, for it to be captured by the rules simply because of the concentration of its ownership by a superannuation fund does not seem appropriate.

Accordingly, for the sake of simplicity ASFA is of the view the revenue of a complying superannuation entity should not be aggregated or consolidated with other entities for any purposes under the rules.

## Recommendation 2

### **Grouping rules should not aggregate revenue of a complying superannuation entity or a Pension Services Entity**

The assessment of whether an Australian company meets the revenue thresholds under Pillars One and Two should not factor in any grouping with a superannuation fund, but be based on that company's own revenue or as applicable consolidated revenue as reported in its financial statements.

## Recommendation 3

### **If recommendation 2 is not accepted, then clear guidance should be provided as to how revenue of a complying superannuation entity is to be aggregated**

The rules should provide for a simple mechanism for a downstream investee entity of a superannuation fund to determine the aggregated revenue.