

6 January 2020

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

By email: corporate.tax@treasury.gov.au

Dear Sir/Madam

Treasury Laws Amendment (Measures for Consultation) Bill 2019: Significant Global Entities

Extending the Definition of a Significant Global Entities (SGE)

I write on behalf of the Taxation Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

This submission is in response to Treasury's request for comment on the Exposure Draft of the *Treasury Laws Amendment (Measures for Consultation) Bill 2019: significant global entities* (the **Bill**).

The deadline to lodge submissions was **11 December 2019** and we hope Treasury will nevertheless consider this submission. We apologise for it being late but we feel it is worthwhile still sending you our comments.

Submission

In 2015 the OECD released Model Legislation to combat base erosion and profit shifting (**BEPS**) by multinational enterprises (**MNEs**). In response, Australia enacted the *Tax Laws Amendment (Combatting Multinational Tax Avoidance) Act 2015* (Cth) (**MNE Act**). This was designed to deal with the activities of MNEs who divert profits earned in Australia to no or low tax jurisdictions, under artificial or contrived tax arrangements.

The actions taken by the Federal Government to combat BEPS, by introducing legislation (such as the MNE Act above, and strengthened transfer pricing rules) and also by properly resourcing the Australian Tax Office (**ATO**) is to be applauded.

The SGE Amendments

Before introducing the Bill into Parliament, it is appropriate to consider if there should be any carveouts. The Law Council appreciates the consultation opportunity provided by Treasury for this purpose.

The primary object of the Bill is to stop the exclusion of groups from the definition of SGE that are run by investment companies, private companies, trusts and individuals. The Committee agrees with the purpose of the amendments and accepts that object as an appropriate policy setting. However, if such entities do not have a business or subsidiary in a no or low tax jurisdiction, they should not be placed in the same category as MNEs that can and might artificially minimise their taxes.

Businesses which operate in Australia or overseas that do not have a business in a tax haven are placed at a substantial disadvantage to the MNEs that do.

There are a number of Australian businesses that in the last few decades may have grown from small or medium enterprises to having their annual income exceed \$1 billion. It may even be that all (or a very substantial part) of that income is generated only in Australia.

Nevertheless, they will become a SGE under the proposed Bill depending on their global income wherever earned, even if it is only earned in Australia. If entities have set up operations in a tax haven or low tax jurisdiction, then undoubtedly they should be subject to the SGE provisions (regardless of form), which the Bill would achieve. However, if an entity or group has not set up a business or subsidiary in a tax haven and has accordingly paid their fair share of Australian tax (not to mention the other benefits to Australia such as PAYG, GST, employment etc) it is unfair to subject them to the SGE provisions and the additional compliance costs and complexity that accompany them.

The Australian Tax Acts and tax system recognise that there are a limited number of other countries that have tax systems comparable to Australia's in terms of both their operation and transparency. They are the United Kingdom, New Zealand, Japan, Germany, France and the United States of America. They are referred to in Australian Tax Acts as 'Listed Countries'. Special tax treatment is already given to Australian corporate groups that operate in these jurisdictions; for example under the controlled foreign company regime. Further there is a high level of cooperation between the tax administrations in these jurisdictions.

The Law Council appreciates that Treasury wants to make sure that all groups of entities that should be SGEs will be classified as SGEs under the new Bill. Nevertheless, if it is possible, the provision of the Bill should ensure that entities or groups of entities that are not the target of the Bill, should clearly be excluded from its operation. The Committee submits that the Bill should exclude groups of companies that do not operate in no or low tax jurisdictions and accordingly cannot engage in base erosion or profit shifting to minimise their taxes. The Committee notes further that:

- The entities or group of companies that it submits should be excluded from the Bill will still be subject to the ATO's other engagement processes such as the justified trust program, tax assurance and the 'Top 500 private groups tax performance program'. The ATO consider these initiatives to be key elements in ensuring such entities and groups are paying their "fair share" of tax. For example, the ATO's website notes with regard to the Top 500 program:

The program seeks to give the community confidence that Australia's largest private groups and high wealth individuals are paying the right amount of tax. The program aims to increase willing participation, focusing on prevention rather than correction. It involves one-to-one engagements with the Top 500 private groups on an ongoing basis.

- Through this program, these groups are constantly engaging with the ATO. It is unnecessary in circumstances where they do not operate or have a subsidiary in a tax haven or low tax jurisdiction, to additionally subject them to the SGE provisions and ensuing compliance requirements.
- These entities are required by Australian law to lodge audited financial statements and accounts with ASIC. These accounts are available to the public including Australian and overseas tax and other regulators.
- The SGE provisions provide for exuberant penalties. This is appropriate for entities or group of entities that operate business or have subsidiaries in no or low tax jurisdictions. For example, administrative penalties are doubled. A 25% penalty (the minimum administrative penalty) is now increased to 50%, equivalent to the penalty for recklessness. Again, such a measure may be appropriate for entities that engage in BEPS, but not otherwise. In addition, the penalty for failing to lodge tax documents with the ATO by the due date for large entities is 5 times the base rate for every 28 days overdue (being \$1,050). However, for a large entity that is also a SGE, the penalty is 500 times the base rate or \$105,000.
- If the OECD “Pillar Two” proposals for the global minimum tax are implemented, this will prevent multinational companies or significant global groups minimising tax through tax havens in any event.

The Committee proposes that entities or groups of entities that only operate in one or more listed countries should be excluded from the Bill. If at any time in the future they were to operate outside a Listed Country (whether a tax haven or otherwise), they would automatically be subject to the SGE provisions. The Committee submits that it is appropriate to add the following wording after section 7 of the Bill:

- (2B) *An entity is not a significant global entity for the purposes of subsection (2A) if and only if:*
- (a) subject to subparagraph (c), all members of the notional listed company group are residents of Australia for tax purposes;
 - (b) if a member operates through a permanent establishment in another country that country is a listed country; and
 - (c) in the event a member of the notional listed company group is not a resident of Australia it is a resident of a listed country.

Thank you for your consideration.

If you would like to discuss this submission or if you have any questions or comments, please contact Clint Harding, Chair of the Taxation Committee (charding@abl.com.au or on 02 9266 7236).

Yours sincerely,

A handwritten signature in black ink that reads "Greg Rodgers". The signature is written in a cursive style with a large, prominent 'G'.

Greg Rodgers
Chair, Business Law Section