Australian Securitisation Forum

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14 August 2024

Senate Standing Committee on Economics
Committee Office
Department of the Senate
Parliament House
Canberra ACT 2600

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Dear Committee Members

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

Submission by the Australian Securitisation Forum

The Australian Securitisation Forum ("**ASF**")[1] refers to the Committee's inquiry into the Taxation (Multinational—Global and Domestic Minimum Tax) Imposition Bill 2024 [Provisions] and related bills (the "**Pillar Two Bills**", containing the "**Pillar Two Rules**"), and to the ASF's comments in the public hearing before the Senate Economics Legislation Committee on 6 August 2024.

The ASF makes particular comment in relation to the provisions making all Australian securitisation special purpose vehicles ("SPVs") that are "Group Entities" of an "Applicable MNE Group" potentially subject to top-up tax, and jointly and severally liability to any top-up tax payable by a "Group Entity" (each as defined in the relevant Pillar Two Bills).

Securitisation SPVs are, by design, bankruptcy remote. They are typically an Australian unit trust with an independent professional trustee, with assets and liabilities isolated from the assets and liabilities of the rest of that MNE group.

[1] The ASF is the peak industry body representing the Australian securitisation and covered bonds markets. The goals of the ASF are to facilitate the formation of industry positions on policy and market matters, represent the Australian industry to local and global policymakers and regulators and to advance the professional standards of the securitisation industry.

The ASF is concerned that, as currently drafted, the Pillar Two Bills will result in securitisation SPVs being exposed to the top-up tax liabilities of a multinational enterprise group ("**MNE group**") of which it is a member, including on a joint and several basis.

That outcome would be inimical to competition in the Australian financial sector, particularly in relation to home loan interest rates, and would render transactions economically unviable across the securitisation industry going forward. It may also compel the unwinding of existing securitisation structures.

Background in relation to Australian securitisation transactions

As at 30 June 2024, there were a record 56 subsisting public securitisation transactions which raised over $44 billion with non-bank lenders, representing 67% of issuance.

In a typical securitisation structure, a securitisation SPV acquires underlying receivables such as residential mortgages, commercial loans or lease receivables from the originator of those receivables.

To fund that acquisition, the SPV issues notes to investors in different categories (known as "tranches") which have different priorities for payments, different risk ratings and different interest rates.

Over the life of the transaction, the SPV pays interest to the investors and eventually repays the notes.

In this way, the SPV repackages the receivables into a form that someone can invest in.

The SPV can be either a unit trust (typical) or a company (less common). Often, but not necessarily, the SPV is a member of the same consolidated tax group as the receivables originator. Typically, SPVs are single entities, though from time-to-time, a transaction may be affected whereby one SPV holds an interest in another.

The insulation from the insolvency risk of the receivables originator allows the credit of the portfolio to be rated more highly than the credit of the originator, which allows borrowing at lower rates. This lower cost of funds is passed on to the borrowers under the underlying receivables.

The SPV must also be insolvency remote for the protection of investors and to achieve external credit ratings. This is because the notes issued by the vehicle are usually, but not necessarily, rated by a credit rating agency.

According to the credit rating agencies' guidelines, the vehicle must be remote from liabilities (and therefore potential insolvency) which arise in the originator of the receivables. That is, it is necessary for ratings purposes that the vehicle only be subject to known liabilities which are predictable, as to both quantum and timing. This includes tax liabilities.

Impact of the Pillar Two Rules on Australian securitisation transactions

Issues with Pillar Two Rules in a securitisation context

Very broadly, the Pillar Two Rules apply to MNE Groups exceeding the relevant revenue threshold (€750m). They identify Constituent Entities ("**CEs**") within that MNE Group which have not been subject to an effective tax rate of 15% upon their "GloBE" income. That CE is known as a Low Tax Constituent Entity, or "**LTCE**". Unless the jurisdiction in which the LTCE is located imposes its own "top-up tax" (known as a Qualified Domestic Minimum Top-up Tax), the difference between the effective tax rate actually imposed on the LTCE, and 15%, will be imposed upon the ultimate parent entity (the "**UPE**"). This is known as the "income inclusion rule". If the UPE is not in a jurisdiction which has similar rules, then the top-up tax will be imposed upon an entity further down the chain of ownership between the UPE and LTCE which is located in a jurisdiction which has such rules.

Furthermore, if the income inclusion rule does not result in the top-up tax being collected by an entity controlling the LTCE, then the top-up tax will be shared across all members of the MNE Group in Pillar Two participating jurisdictions according to the under-taxed profits rule (the "**UTPR**").

As such, where a securitisation SPV is a member of an MNE group, it is potentially subject to top-up tax (a primary liability).

Further, under the proposed Division 128, if a Group Entity is subject to a top-up tax, then each other Group Entity is jointly and severally liable for such tax (a secondary liability).

Having regard to the exposure of an Australian securitisation vehicle to unknown primary and secondary liabilities to top-up tax, it then becomes impossible for trustees, rating agencies and noteholders to take the position that the securitisation vehicle will be insolvency remote.

An inability to ensure that securitisation SPVs are insolvency remote would likely render securitisation transactions unviable where the originator is sufficiently large to be subject to the Pillar Two Rules. This is likely to have a very negative impact on the securitisation industry in Australia, with a flow-on effect to borrowers.

Proposed solution

The OECD guidance published in June 2024 (the "**June 2024 Administrative Guidance**") recognises the unique position of securitisation entities and propose that top-up tax liabilities not be imposed on securitisation SPVs. However, the definition used by the June 2024 Administrative Guidance references specific tax regimes elsewhere in the world and does not translate well into the Australian securitisation industry experience, which has been adapted to the domestic rules relating to trusts and companies. The June 2024 Administrative Guidance also appears to be cognisant of the varying ways in which securitisation entities are structured; as such, the definition being narrowly cast appears to be an oversight.

Therefore, the ASF submits that securitisation SPVs be excluded from being allocated any liability under the Pillar Two Rules by reference to the definition of insolvency-remote special purpose vehicles found in section 820-39 of the *Income Tax Assessment Act 1997* (Cth). This definition, introduced in 2003 in response to the excessive narrowness and rigidity of the definition in section 820-942, was recently extended to exclude securitisation SPVs from the recent amendments to the thin capitalisation regime. It is a long-standing and well-known definition which is particularly targeted towards, and is very familiar to, the Australian securitisation industry.

Such a definition being used as a basis for exclusion from allocation of liability would allow trustees, credit rating agencies and noteholders to conclude reasonably that no unexpected or unpredictable liabilities arising from the globe regime for top-up taxes will be imposed upon a securitisation vehicle. It would also allow the parties to the existing array of securitisation SPVs to continue in certainty of their current position, rather than being compelled to potentially unwind the transaction going forward.

Importantly, the exclusion of SPVs from an allocation of liability under the Pillar Two Rules will not exclude GloBE Income referable to the SPV from contributing to that MNE Group's GloBE Income. The GloBE Income from securitisation SPVs will still be captured by the Pillar Two Rules, and no amounts will escape the Australian tax net.

The exclusion of securitisation SPVs from an allocation of liability under the Pillar Two Rules by means of the section 820-39 definition should not result in the Australian Pillar Two Rules being "non-qualifying". "Qualified IRR" is defined in Article 10.1 of the *Tax Challenges Arising from Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)* (Model GloBE Rules) as follows:

> Qualified IIR means a set of rules equivalent to Article 2.1 to Article 2.3 of the GloBE Rules (including any provisions of the GloBE Rules associated with those articles) that are included in

> the domestic law of a jurisdiction and that are implemented and administered in a way that is consistent with the outcomes provided for under the GloBE Rules and the Commentary provided that such jurisdiction does not provide any benefits that are related to such rules.

Similarly, “Qualified Domestic Minimum Top-Up Tax” is defined as:

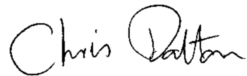
> a minimum tax that is included in the domestic law of a jurisdiction and that:
>
> … (c) is implemented and administered in a way that is consistent with the outcomes provided for under the GloBE Rules and the Commentary, provided that such jurisdiction does not provide any benefits that are related to such rules.

As noted above, the June 2024 Administrative Guidance contemplates the exclusion of securitisation SPVs from the Pillar Two Rules, though the definition is drafted by reference mainly to other countries’ securitisation structures. However, the OECD guidance does expressly contemplate that securitisation SPVs may be structured in a variety of ways.

The ASF is therefore of the opinion that, to prevent an allocation of liability to securitisation SPVs under the Pillar Two Rules, the use of the existing section 820-39 definition, which is aimed squarely at the same types of entities discussed in the June 2024 Administrative Guidance (and only those entities), should not cause Australia’s Pillar Two Rules to be non-qualifying. The use of that definition is entirely consistent with the “outcomes provided for under … the Commentary”, given the June 2024 Administrative Guidance is to be incorporated into the Commentary. Such an approach has precedent: the UK has already enacted a similarly jurisdiction-specific exemption for securitisation SPVs using existing definitions under their laws.

Please let us know if you wish to discuss this matter in more detail.

Yours sincerely,



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