June 13, 2025

Australian Productivity Commission
Level 8, Two Melbourne Quarter
697 Collins Street, Docklands
VIC 3008, Australia

Re: Response to Consultation Questions for Pillar 1: Creating a more dynamic and resilient economy

The National Foreign Trade Council (the "NFTC") is pleased to provide a written response to the Australian Productivity Survey regarding the implementation of "Pillar 1: Creating a more dynamic and resilient economy" of the Treasury Laws Amendment. NFTC has previously provided comments on a number of tax proposals and laws, which are available at www.nftc.org.

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. We value work that focuses on establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations.

Over the past decade, the international tax landscape in Australia has become increasingly more challenging and uncertain, deterring private sector investment. NFTC's main concerns that discourage investment or risk taking, include:

- Unreasonable informational and data burdens, consuming significant taxpayer resources
- Guidance from the ATO that conflicts with decisions of Australian Courts
- Passage of tax legislation with retrospective effect
- Lack of consideration for commercially sensitive material or information
- Increased administrative burden from overly complex forms, particularly the Reportable Tax Position, Corporate Tax Positions Schedule, and the Australian Local file

The burden for companies seeking to comply with these regulations has increased significantly and it restricts the adaptability and growth of taxpayers. We urge Australia to reduce the regulatory burden of these laws and regulations.

Thank you for the opportunity to provide consultation on the impact of regulation on business dynamism. NFTC appreciates your consideration of these comments and the concerns to be heeded for a productive future in Australian foreign investment. We are happy to provide additional information or answer any questions regarding our comments.

Sincerely,

Anne Gordon
Vice President, International Tax Policy

Answers to Questions

Section 1. About you and/or your organisation

Attribution

7. Whose views does your response represent? (Please include the full names of applicable individuals, groups or organisations).

The National Foreign Trade Council

8. Do any of the attributed parties identify as Aboriginal or Torres Strait Islander/are any identified organisations an Aboriginal and/or Torres Strait Islander organisation?

- No

Consent

9. Do the attributed parties consent to the PC publishing your response on our website and referring to it in our reports?

- Yes, with attribution

10. Guidelines and policies agreement

- I have read and agree to the above guidelines and policies.

Providing supporting documents (optional)

At this stage of the inquiry, we are only accepting and reviewing supporting documents that meet the following criteria:

- They contain data, charts and supporting information relevant to the policy areas and questions we are asking in this round of consultation
- The attributed participant(s) hold the copyright for the information contained in the documents
- The documents don't include any personal or identifying information.

There will be an opportunity to provide submissions on our policy reform ideas when we release our interim report.

11. Will you be providing any documents to support your response? ·

Yes

We are seeking responses to questions on two policy reform areas.

Which policy reform areas would you like to respond to?

- **Support business investment through corporate tax reform**

  A more effective corporate tax system can help Australia attract foreign capital, and spur businesses to invest, innovate and improve labour productivity. We are interested in your views on how to encourage investment in Australia through the tax system.

- **Reduce the impact of regulation on business dynamism**

  Reducing excessive or inappropriate regulation can unshackle business and enhance business dynamism and productivity. We are interested in your experience with regulation, both good and bad.

Section 2. Support business investment through corporate tax reform

Private sector investment as a share of GDP outside of mining has fallen approximately 3 percentage points since 2009. This is contributing to Australia's stagnant productivity growth.

In this question, we want to hear your views on what has encouraged or restrained investment in Australia over the past 10 years.

1. What features of the Australian business environment have encouraged or restrained investment over the past 10 years?

It has been rare to see a federal election where one of the main campaign themes hasn't negatively impacted foreign investors. The themes of Australia's election campaigns over the last 10 years have been focused on painting large multinational groups in a negative light. For example, some key election commitments have been "making large multinational corporations pay their fair share of tax" and "ending corporate tax avoidance through artificial debt shifting into low-tax jurisdictions". In addition, the lack of a self-assessed deferral or multi-year deferral or exemption for commercially sensitive data in Australia's public Country-by-Country Reporting ("CbCR"), despite this being recommended in numerous submissions during consultation, further reflects the fact that the Australian government believes tax transparency is an easy way to win votes, regardless of the actual level of tax avoidance that may exist.

These campaign themes have caused the tax landscape to become increasingly more challenging over the last 10 years and have discouraged investment. For instance, the CbCR regime is a deterrent to increased investments and expansion by multinational firms in Australia. This is especially true for privately held corporations and those with sensitive data.

2. What elements of the corporate tax system encourage and/or discourage investment and risk-taking?

Our members view risk management as a major consideration when it comes to investment. Providing certainty and stability is a key factor in managing risks. Compared to the investment environment a decade ago, Australia's business environment is far less certain and stable now.

There have been multiple examples of government, treasury, and regulator policies that have resulted in a significant amount of uncertainty in the corporate tax system.

More specifically, the Australian Taxation Office ("ATO") was always very clear that they were simply administering the law and would apply the law based on legislation and case law. Accordingly, when the ATO lost a case in the Federal Court or Full Federal Court, it would adjust its public guidance to reflect these Court decisions. However, there have been several recent examples where the ATO has refused to accept the decision of a Court, despite the fact that they are bound by it. Thus, it is difficult to know which guidance can be trusted and relied upon which decreases uncertainty.

For example, the Commissioner of Taxation failed in the Full Federal Court of Australia in the PepsiCo case but has decided against updating its public guidance to align with this decision until the High Court judgement is released, resulting in an extended period of limbo for taxpayers currently operating in Australia and discouraging taxpayers to invest in Australia. In addition, the Commissioner has also failed in the Full Federal Court of Australia on the interpretation of tax laws to unpaid present entitlements of discretionary trusts. This case involved the Commissioner of Taxation challenging a position that has been routinely adopted by taxpayers for over 10 years, and only recently challenged by the ATO. The ATO has not yet adjusted its most recent position on the interpretation of this Division.

Another area of concern is the practice of announcing changes to long-standing tax legislation with retrospective effect or announcing laws with an effective date that pre-exists the legislation being drafted. Recently, this occurred with Australia's overhaul to its thin capitalisation regime.

In addition to the previously announced and consulted upon thin capitalization rule changes, the final legislation introduced new tax rules that apply retrospectively to existing arrangements, without offering any concessions or grandfathering for existing debt arrangements nor offering any guidance in respect of how to treat these existing arrangements. This is problematic for taxpayers working to comply with the rules. Specifically, this refers to the introduction (without consultation) of the "debt deduction creation rules" which can apply to existing arrangements where that debt has been used for certain specified purposes in the past. There is no requirement that the specified purpose be related to tax avoidance or generate any tax benefit. Further, taxpayers have been advised that there is no limit to the potential period of proposed examination and that they need to "trace" the funds' usage since the arrangement was first put in place. Despite the fact that the rules have been in effect for almost 18 months there is still no guidance on how in practice this is supposed to be carried out when there has been no requirement to maintain these types of records previously, nor has guidance been provided on how taxpayers should perform such an exercise in different relation to different types of arrangements (for example, how to trace the use of funds in a cash pooling arrangement?).

In addition to risk management and the current lack of certainty and trust in Australia's taxation system, the fact that the "Significant Global Entity" ("SGE") and CbCR entity definitions still apply to very small operations in Australia (such as having a few people on the ground for BD purposes), where those small operations are part of a large multinational group, also detracts from investment in Australia. Some multinationals seek advice around entering into the Australian market, only to immediately give up on the idea when we inform them that the CbCR rules will apply along with SGE penalties for non-compliance.

Draft Ruling TR 2024/D1 “Income tax: royalties - character of payments in respect of software and intellectual property rights” is another example of a policy that we understand ATO intends to apply retroactively. This practice discourages investment by creating unpredictability in tax liabilities owed by Multinational Enterprises (“MNEs”) and undermining the confidence businesses have in the regulatory predictability of the ATO.

The CbCR regime as enacted is a deterrent to increased investment and expansion by MNEs in Australia. This is especially true for privately held corporations and those with sensitive data. Australia’s more detailed public CbCR requirements and in particular the inability to self-assess a “commercial sensitivity” deferral and the need to apply for the Commissioner’s discretion on an annual basis will have impacts on businesses deciding whether or not to invest in Australia. CbCR disincentives investment by creating a reporting regime with elements not required in any other global jurisdictions and punishes investors. In some instances, ATO already possesses most of this information, such as with CbCR, when ATO has similar information from non-public CbCR.It will not create any revenue for the government as the ATO already has access to these data points.

Lastly, the level of information now requested by the ATO from corporations operating in Australia has become unreasonable and discourages both investment and risk-taking. A significant amount of this is non-quantitative information that might potentially assist the ATO with identifying a taxpayer that has adopted a risky tax position, but in most cases, will simply result in every corporate taxpayer having to spend significant resources (both internal and external) to comply with when no or minimal tax risks exist.

Another such example is the Reportable Tax Position (“RTP”) Schedule, which was initially a fairly simple form to complete. However, each year it grows in size as the ATO introduces new areas of risk that it wants to focus on and introduces new guidance. In 2016, the RTP Schedule instructions were 13 pages long and essentially required taxpayers to respond to 3 main questions. In 2024, the RTP Schedule instructions had grown to 61 pages in length with responses to 40 main questions. It is worth noting that the 61 pages of instructions does not include the various “PCGs” (Practical Compliance Guidelines), Taxation Rulings and other ATO Guidance that the instructions refer to (there are approximately 30 different rulings, PCGs etc referred to). Taxpayers have to separately read each of these and then self-assess their level of risk for disclosure in the RTP Schedule.

In addition to the RTP schedule, updates to the Short Form section of the Australia Local File (“ALF”), requiring substantial additional non-quantitative data, were introduced despite significant levels of concern and issues raised by both industry and professional advisors. To provide context, the instructions for the Short Form prior to 2024 were previously 8 pages long and required non-quantitative information relating to the business, such as its organisation structure, competitors, etc. In 2024, the updated Short Form instructions increased to 140 pages in length. In addition to the substantial increase in information being requested in the short form, the ATO also eliminated exemptions that were previously available in relation to filing the Short Form, increasing the number of taxpayers that are required to comply with this new burden.

NFTC focuses on tax issues in our responses, but our members find complexities in the regulatory framework across the spectrum from the human resources reporting to the reporting standards for transactions.

Tax systems come with compliance costs. The more complex the tax system, the higher these costs tend to be.

In this question, we want to understand what aspects of the tax system you think are unnecessarily onerous, costly or complex. We also want to hear your views on how the compliance burden can be reduced.

3. **Which parts of the corporate tax system do you find the hardest, or most time or cost-intensive to comply with? How could the compliance burden of the corporate tax system be reduced?**

Completing the reportable tax position schedule (refer additional comments above), is a very time intensive task that essentially requires taxpayers to self-assess and report their level of risk on various matters to assist the ATO with potentially identifying taxpayers to review. The compliance burden could be reduced by removing the need for Top 100 and Top 1,000 taxpayers to complete the RTP schedule and simply ask these RTP Schedule questions during one of the ATO's routine Assurance Reviews. The ATO already has an extensive "Assurance Review" program that results in routine reviews of all Top 100 and Top 1,000 corporate taxpayers in Australia, with the intention being that every one of these taxpayers will be required to complete a review every 4 years.

The ALF, which includes the "Short Form" (refer to the comments above in question 2), Part A (which is a detailed transaction listing of all international related party dealings for the year), and Part B is also extremely time-intensive to comply with. NFTC members noted that, prior to investing in automation and digitisation efforts, which required the involvement of a number of different external advisors and associated costs, preparing the ALF for a large MNE used to take one full-time person 3-4 months to complete. The compliance burden could be reduced by reversing the significant changes to the Short Form section of the ALF, which requires a significant amount of information relating to reporting lines and other non-tax specific matters. It is merely an information gathering exercise for the ATO and such questions could be asked during any review process, rather than being required to be answered annually.

While members have not yet reported CbCR, we are concerned that the data required is not readily available to many in-scope businesses and will place an additional compliance burden at the same time Australia and other countries are implementing the Inclusive Framework's Pillar Two regime. The law as passed is overly broad and is beyond what is included in Organization of Economic Co-operation and Development ("OECD") Confidential CbCR as well as what is required under the public CbCR EU Directive 2021/2101 ("EU Public Directive"). Neither the statement on approach to tax included on CbCR filing, the disclosure of Tangible Assets, nor the reconciliation prepared by the jurisdiction between income tax accrued and taxes due and paid are requirements in the EU Public Directive. NFTC has recommended providing an exception from reporting for information that an entity does not possess or have reason to possess this information in the normal course of business. We also requested that the exception should also include relief from reporting where the provision of the information would violate the law in any relevant jurisdiction (e.g., due to confidentiality or privacy). Furthermore, exceptions should be granted on a multi-year basis and be provided prior to the deadline for reporting (assuming the

MNE applies for an exemption in a timely manner.) These suggested changes have yet to be adopted.

Lastly, applying Australia's interpretation of the Hybrid Mismatch rules is especially burdensome. In particular, Australia's legislation as enacted and the ATO's interpretation of the legislation as it relates to potential imported mismatches are complicated to comply with. For MNEs where the ultimate parent is a flow-through entity, it is virtually impossible to fully comply with the ATO's guidance on how to implement these rules in practice. The ATO has stated in their guidance that all payments relating to a potential imported mismatch are denied unless it is proven that there is no mismatch (guilty until proven innocent). The compliance burden could be improved by requiring there to be a linkage between on-payments so that a payment from one non-Australian entity to another non-Australian entity does not need to be traced unless there is some kind of connection to the payment from Australia.

Another path to reducing the compliance burden would be to loosen how strictly the tracing provisions relating to Dual Inclusion Income have been drafted. Currently, it is very difficult to trace "Dual Inclusion Income" through multiple payments. In summary, the current rules require the tracing of indirect payments coming out of Australia to other group entities and assume these are "bad" unless you can prove there is no hybrid mismatch in the foreign country. On the other hand, it is very difficult to trace revenues coming from 3rd party customers (*i.e.*, good income) if Australia receives the revenue indirectly through an international related party. A more balanced approach would provide compliance burden relief.

Section 3. Reduce the impact of regulation on business dynamism

All regulations have costs and benefits. Good governance involves only introducing new regulations when the expected benefits exceed the expected costs and when this net benefit is larger than that of other options.

In the first question, we want to hear your views on what regulations are good for business dynamism and resilience.

4. **What areas of regulation do you see as *enhancing* business dynamism and resilience? What are the reasons for your answer?**

NFTC has not identified any regulations that have enhanced business dynamism.

For more than a decade we have heard that the burden of government regulation has grown. This is limiting businesses' ability to use resources efficiently, innovate and grow.

In the next questions, we want to hear your views on different problematic regulations you may have experienced or observed, and whether the problem has gotten worse over time.

5. **How has your regulatory burden changed over time?**

The Payment Times Reporting ("PTR") released in 2021 significantly increased the regulatory burden. The implementation costs for the PTR were very large for some taxpayers, who invested in advisor assistance to determine reporting entities, Generally Accepted Accounting Principles ("GAAP") analyses, assistance implementing the new system, etc. When first released, the PTR rules were drafted so hastily that only 3 years later, a complete overhaul of the system was announced, rendering all past efforts and costs for companies redundant and ushering in a new wave of compliance costs and time commitments.

6. **What regulations do you find time-consuming, overly complex or otherwise constraining business dynamism and resilience? What are the reasons for your answer?**

The Draft Ruling TR 2024/D1 "Income tax: royalties - character of payments in respect of software and intellectual property rights" greatly constrains business dynamism and will create even more uncertainty for taxpayers. The overly broad interpretation of "software arrangement" creates uncertainty for taxpayers and overcompensation in withholding. This risks significantly increasing costs borne by the taxpayer and discouraging market activity. The inconsistencies within the outlined law and the law's failure to align with international tax reporting norms make compliance complex and time-consuming to navigate. NFTC recommends that the ATO withdraw the draft ruling in its entirety, in adherence with the longstanding policy reflected in the 1993 ruling, which comports with the OECD treaty commentary and international norms. If the Draft Ruling is not withdrawn, NFTC recommends that ATO exclude the distribution of tangible products other than pure storage media or computing devices that contain software that can be sold separately from the scope of the Draft Ruling.

Other regulations that our members find burdensome or restrictive to adaptability and growth include:

- payment times reporting, for high implementation costs and excessive revisions, rendering previous efforts moot
- Reportable tax position, increases to length and complexity, and the self-assessment requirement (see comments above)
- Australian Local File, for intensive information burdens and increases in form length (see comments above)

7. **Can you share any specific examples of where you think a regulator has done a good or bad job of understanding and reducing regulatory burden on businesses and why?**

The ATO carries out a revolving "assurance review" program, which is an extensive review (i.e. it is a "friendly audit") under which the Top 1,100 taxpayers receive a "Level of Assurance" from the ATO (i.e. how much assurance does the ATO have that the taxpayer is meeting its tax compliance obligations). Another way to reduce the compliance burden would be to leverage this ATO-issued level of assurance and only require taxpayers who receive a low or medium level of assurance to complete certain obligations, such as the RTP Schedule and Australian Local File Short Form.