Assistant Secretary
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600
E-mail: MNETaxintegrity@treasury.gov.au

Centre for International Corporate Tax Accountability & Research and Tax Justice Network - Australia Joint Submission to the Australian Treasury's Consultation on Multinational Tax Integrity and Enhanced Tax Transparency

2 September 2022

The Tax Justice Network Australia (TJN-Aus) and the Centre for International Corporate Tax Accountability and Research (CICTAR) welcome this opportunity to make a joint submission to the consultation on multinational tax integrity and enhanced tax transparency.

Ensuring multinationals pay a fair share of corporate income tax is necessary for the broader integrity of the tax system and to level the playing field for all businesses, particularly small and medium sized enterprises. In addition to direct efforts to close loopholes for multinational tax avoidance and raise revenues for public services, we note that transparency efforts can increase corporate income tax revenue through shifting both corporate behaviour and public attitudes towards fair taxation. Since the COVID-19 global pandemic, there is a growing awareness of the essential need for well-funded public health systems and an understanding that additional revenues will be needed to pay for the increased government support provided to the community through the pandemic. There is also growing awareness that increased public investments are needed for aged care, early childhood education, disability services and income support and that these investments will create a better society and stronger economic future for all. Increasing income tax revenues from multinationals is an important part of the solution and increasing fairness and broad-based economic growth.

While TJN-Aus and CICTAR continue to strive for broader reforms to national and international tax systems, including towards a unitary tax system and away from the arm's length principle, we are encouraged by the measures proposed in this consultation paper. We are also encouraged by progress through the OECD towards a minimum corporate tax, noting that the proposed rate of 15% is far too low and encourage the Australian government to push for a higher rate, closer to the average corporate tax rate in OECD countries and Australia's 30% corporate tax rate. In particular, we are very encouraged by the proposal for mandatory public country by country reporting for multinationals. Australia has an opportunity to adopt a global best practice and to become a leading jurisdiction for others to follow.

Part 1. Denying MNEs deductions for payments relating to intangibles and royalties paid to low or no tax jurisdictions

The submitting bodies note that artificially loading up debt is a key technique that multinational corporations use to shift profits out of the jurisdictions where they are doing business to low tax jurisdictions to avoid paying tax where profits are genuinely earned. Allowing interest repayments in intra-party loans to be claimed as a tax deduction facilitates this tax avoidance technique.

The submitting bodies are concerned that the thin capitalisation safe harbour has been misused by corporations as giving them an acceptable limit of tax avoidance they are allowed to engage in through artificial debt loading through intra-party loans. In other words, the corporation makes a loan it does not need, as the financing in question could be provided through equity, from a low tax jurisdiction for the primary or sole purpose of avoiding paying tax in Australia through being able to claim interest repayments to itself as a tax deduction. In consultation with governments and tax authorities, the OECD found that fixed ratio/ equity tests were not best practice to tackle base erosion and profit shifting.[1]

The submitting bodies support the recommendation of the OECD on BEPS Action Point 4 for the introduction of a limit on interest deductions based on the consolidated net interest expense of the whole multinational corporate group to third parties, apportioned to each group member according to earnings before tax, interest, depreciation and amortisation (EBITDA).

We strongly recommend that MNEs only be allowed to claim their actual interest expense to third parties as a tax deduction, no more and no less. There is plenty of evidence of great variations of gearing not only between different business sectors but even companies in the same sector. Evidence of the variation was provided in a study by PwC included in the comments by the Business at OECD (BIAC) on the BEPS Action 4 discussion draft.[2] Hence, the best and fairest method to accommodate interest payments as deductions is a Group Ratio Rule, as was recommended in Action 4 of the BEPS project in 2015. If this is adopted as an option for MNEs to choose in conjunction with a fixed cap, the cap should be set no higher than 10% of EBITDA the lowest bound of the range recommended in the BEPS project report.[3] The PwC study showed that 39% to 45% of businesses had interest expenses greater than 10% of EBITDA. Only 17% to 22% had a ratio over 30%.[4] Thus, a fixed cap set at 30% would continue to allow a large majority of MNEs to avoid tax by deducting levels of interest in excess of their actual third-party interest expense.

1. Considering the policy intent of limiting debt deductions to genuinely commercial amounts, should the fixed ratio rule rely on accounting or tax figures? On what basis do you say this?

The fixed ratio rule should rely on tax figures. Accounting figures would need to be adjusted for any material differences caused by inconsistent financial accounting rules and differing accounting and tax treatments of significant items, at both the group and entity levels. Any allocation of net interest expense based on group accounting must be based on data drawn from the consolidation process where:

- all intra-group transactions have already been eliminated from consideration; and

[1] OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2015 Final Report,* 2015, 21.
[2] BIAC comments on Discussion Draft on BEPS Action 4 (February 2015), Part 1, 136.
[3] The BEPS Monitoring Group, 'Tax Deductibility of Corporate Interest Expense', Submission to UK HM Treasury.
[4] BIAC comments on Discussion Draft on BEPS Action 4 (February 2015), Part 1, 136.

- the accounts of subsidiary entities have, if necessary, been restated from the local accounting standards to those of the group financial statements.

2. Will the move to a fixed ratio based on earnings impose additional compliance costs on taxpayers? Can these costs be quantified?

3. What factors influence an entity's current decision to use the safe harbour test (as opposed to the arm's length debt test or the worldwide gearing test)?
In the experience of the submitting bodies entities will choose to use the safe harbour test whenever it is available to them. The reason for that behaviour is that the test is simple and the ATO is unlikely to do much investigation when the entity's related party debt is within the safe harbour. By contrast, the arm's length debt test and the worldwide gearing test require more work to use and justify and are more likely to attract attention from the ATO as their use is likely to occur where the related party debt is higher than would apply in the case of the safe harbour test. Hence, any safe harbour should be set low, as we recommend above.

5. Should there be any changes to the existing thin capitalisation rules applicable to financial entities and authorised deposit-taking institutions?
The submitting bodies acknowledge that different rules are needed to address the risks of profit shifting by financial entities and authorised deposit-taking institutions. As the OECD pointed out the fixed ratio rule and the group ratio rule are unlikely to be effective in addressing base erosion and profiting shifting involving interest payments for financial and insurance entities.[5]

6. Would the existing $2 million *de minimis* threshold be an appropriate threshold for the fixed ratio rule, to exclude low-risk entities?
There should be no increase in the *de minimis* threshold above the current $2 million. Further, the ATO should be consulted at what level of debt deductions they would have the resources to investigate if the *de minimis* was lowered. If the ATO would be able to investigate suspicious debt deductions at less than $2 million, then the de minimis threshold should be lowered to that level.

Small businesses are overwhelmingly likely to have simple structures and financing arrangements, meaning their need for an exemption is likely to be low as it will be easy for them to demonstrate that their financing arrangements are for legitimate purposes.

As recommended by the OECD, any *de minimis* threshold should be applied to the total net interest expense of the local group where the group has more than one entity in Australia. Anti-fragmentation rules should be used to prevent a group avoiding the application of an interest deduction limitation rule by establishing a number of entities, each of which falls below the threshold.[6]

8. What features of fixed ratio (earnings-based) rules in other jurisdictions are most significant (relevant) for implementing a fixed ratio rule in the Australian context?
The submitting bodies strongly oppose the ability of MNEs to carry forward interest payments to be used as deductions in subsequent years when the interest repayments exceed the fixed ratio cap. The inclusion of such a provision does not curb profit shifting losses from government tax revenue, it spreads the losses into future years.

[5] OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2015 Final Report,* 2015, 27.
[6] OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2015 Final Report,* 2015, 12, 26, 35.

Further, caution should apply to the degree to which the design of the new rules draw on those of other jurisdictions. Unfortunately, there appear to be a lack of objective evaluations into the effectiveness of measures to limit profit shifting through interest payments. We strongly believe that reforms are needed. Our concern is in relation to measures that limit the application of rules designed to curb tax avoidance and profit shifting through interest payments. For example, the German rules offer exemptions to the measures to curb profit shifting through interest payments for:[7]

- net interest payments (interest paid minus interest received) below a *de minimis* of €3 million for the tax year;
- for stand-alone companies, that is the company cannot be included in a consolidated financial statement prepared in accordance with International Financial Reporting Standards principles; or
- the debt-financed entity can prove that its equity ratio as per the previous balance sheet date was better or no worse than by 2% compared with the equity ratio of the entire group.

Where none of the above exemptions apply, net interest paid in excess of the cap amount of 30% of the borrower's EBITDA (adjusted for tax purposes) is disallowed in the current year. However, the interest repayments can be carried forward indefinitely to subsequent tax years, subject to restrictions that apply in the case of detrimental transfers of shares in which interest carry-forwards, as loss carry-forwards, fully or partially cease to exist. We could find no evaluations on the impact of the exemptions.

The OECD pointed out that stand-alone entities may be large entities under the control of the same trusts or partnerships, where there are a number of entities under the control of the same investors. In these cases the level of base erosion and profit shifting risk may be similar to that posed by a group structure.[8]

9. If the Government adopts an earnings-based group ratio rule to complement the fixed ratio rule, should the existing worldwide gearing test (based on a debt-to-equity ratio) be repealed? If not, why?

As argued above, we strongly recommend that the group ratio rule should be regarded as the primary rule, and if a fixed cap is offered as an alternative, it should be set low. Allowing several options for MNEs to choose would provide them opportunities for tax avoidance, and add to the administrative burdens of the ATO.

12. Would introducing a fixed ratio rule encourage entities not currently using the arm's length debt test to shift to an arm's length test? If so, why? Are there specific sectors where this type of behavioural response is likely to be more evident?

It seems likely that if the fixed ratio rule would deny interest deductions above the ratio threshold, impacted entities are likely to turn to the arm's length debt test as a means to get the interest payments allowed as deductions. The deterrent will be the additional administrative effort that would be required to apply for allowance of the interest payments as deductions through the arm's length test.

If the Government undermines the effectiveness of the fixed ratio rule by allowing unclaimed interest payments as deductions under a carry forward or carry back arrangement then it is likely less entities will seek to apply for the arm's length test as it will be easier to claim the deductions in past or future years. Such an approach is likely to be preferred by MNEs

[7] Markus Ernst, 'The Corporate Tax Planning Law Review: Germany', https//thelawreviews.co.uk/, 10 May 2022.

[8] OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2015 Final Report,* 2015, 34.

engaged in profit shifting as a carry forward or carry back allowance would expose their arrangements to less scrutiny than having to apply to the arm's length test.

14. To what extent does the current arm's length debt test permit BEPS practices to occur? What changes should be made to ensure that an arm's length test complements the fixed ratio rule?

The OECD pointed out that the arm's length debt test has been found difficult to apply to situations of groups structuring intragroup debt with equity-like features to justify interest payments significantly in excess of those the group actually incurs on its third party debt. Additionally, an arm's length test does not prevent a corporation from claiming a deduction for interest expense which is used to fund investments in non-taxable assets or income streams.[9]

The evidence collected by the OECD for Action 4 of the BEPS Project showed that the arm's length debt test permits MNEs to adopt BEPS practices involving excess interest deductions. To continue to allow MNEs to justify interest deductions under an arm's length debt test only encourages the continuation of such practices, while adding to the administrative burdens of the ATO. The rules should be simplified by adopting a Group Ratio Rule, and if a fixed cap is considered desirable it should be no higher than 10% of EBITDA.

17. Would additional limitations be required to prevent any unintended consequences, such as 'debt dumping' or other debt-creation integrity concerns?

The submitting bodies would support additional restrictions on claiming interest repayments on related party debts, such as those imposed by Hong Kong under Cap. 112 Inland Revenue Ordinance – Section 16 Ascertainment of chargeable profits.[10] Under the Ordinance a tax deduction will be allowed for the interest incurred on the related borrowing to finance the intra-group financing business only if all of the following conditions under s16(2)(g) are met:

(i) interest is incurred by the corporation in the ordinary course of its intra-group financing business;
(ii) interest is incurred on money borrowed from a non-Hong Kong associated corporation;
(iii) interest in the hands of the lender has been or will be taxed overseas at a rate greater than or equal to 16.5% (or 8.25% if the interest-paying corporation is a QCTC), and;
(iv) interest is received by the lender as the beneficial owner and is not passed on to any other person under any contractual or legal obligation, unless the interest is obliged to be passed on under a genuine arrangement at arm's length (for example, due to genuine security on the loan or sub-participation). This beneficial ownership requirement is to prevent an interest deduction being given to a lender which is a conduit, agent or administrator acting on behalf of other interested parties.

Condition (iii) above will not be regarded as satisfied if the interest has been reduced to nil or negative by direct expenses or the offset of losses. In the event that condition (iii) above is partially failed, apportionment is possible to restrict the interest deduction to the qualifying portion under ss(2CA) and (2CB). Moreover, if the IRD considers that the main purpose of the intra-group financing transaction is to utilise a loss for the avoidance of tax, the interest deduction will be denied under ss16(2CC) and (2CD).

---

[9] OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2015 Final Report,* 2015, 20.
[10] https://www.elegislation.gov.hk/hk/cap112!en

The provisions in the Ordinance are to counter sub-participation and back-to-back loan arrangements by which Hong Kong taxpayers were previously able to circumvent the conditions in and thwart the legislative intent of these provisions.[11]

Part 2. Denying MNEs deductions for payments relating to intangibles and royalties paid to low or no tax jurisdictions

There is strong evidence of abuse of payments relating to intangibles and royalties by MNEs that justify further government action to curb these abuses. Santacreu and LaBelle (2022) found that a large number of patents were shifted to the British Virgin Islands, Barbados, Bermuda and the Cayman Islands while the inventors of the knowledge being patented were located elsewhere. Almost all patents in Barbados, Bermuda and the Cayman Islands are owned by MNEs.[12]

The following case studies are based on existing CICTAR research and likely represent broader practices of other multinationals operating in Australia. The analysis is largely based on ATO data, financial statements of subsidiaries and company annual reports. Source materials, citations and deeper analysis can be provided.

Case Study – Mc Donald's

In 2020, McDonald's main subsidiary in Australia either paid or owed service fees of $602 million to a shell company in the UK, McDonald's Asia Pacific, which is at the heart of new allegations of global tax dodging by the global burger giant.[13] This does not include other significant related party transactions that could have also been used to artificially reduce tax payments in Australia. These service fees are a form of royalty payments and are charges for the use of intellectual property rights that the global burger giant shifted from Singapore to London. The change to McDonald's global profit shifting scheme occurred after European Union investigations into profit shifting through Luxembourg subsidiaries.

The shifting of profits through service fees dramatically reduced taxable profits in Australia. In fact, the service fees siphoned offshore to the tax shelter company were more than double the pre-tax profits of $286 million reported in Australia in 2020.[14]

The profits shifted out of Australia in service fees were nearly double the total employee expenses – wages and benefits for all workers – in Australia of $305 million in 2020.[15]

[11] https://home.kpmg/xx/en/home/insights/2021/03/hong-kong-taxation-of-cross-border-mergers-and-acquisitions.html

[12] Ana Maria Santacreu and Jesse LaBelle, 'Profit Shifting Through Intellectual Property', Federal Reserve Bank of St Louis, Number 22, 2022, 1.

[13] This subsidiary is McDonald's Australia Holdings Pty Ltd, figures come from the Financial Report for the year ended 31 December 2020. The vast bulk of the service fees, $558.5m are reported in the cash flow statement (p.8) as "Service fee paid to related entity". It is further disclosed (p.40, Note 26) that $547.2m in service fees were paid to "McDonald's Asia Pacific", with a service fee balance at the end of 2020 of $52.3m and location fees paid to the same entity of $2.5m. These amounts total $602m. McDonald's Asia Pacific is the primary focus of a report, Secrets & Fries, launched in the UK in March 2022 and co-produced by CICTAR: https://waronwant.org/sites/default/files/2022-03/Secrets%20%26%20Fries%20%28WOW%20report%29.pdf
The report was covered in the ABC here: https://www.abc.net.au/news/2022-03-18/mcdonalds-fined-for-withholding-information-from-ato-tax-bill/100904170

[14] McDonald's Australia Holdings Pty Ltd, Financial Report for the year ended 31 December 2020, p.6 Income Statement.

[15] Ibid, p.23, Note 4(b). Figures for wages and benefits do not reflect franchisees.

The profits shifted out of Australia in service fees were over $70 million more than the total cost of ingredients and packaging reported by the company in 2020.[16]

Earlier this year, McDonald's was convicted and fined in court for failing to provide documents requested by the ATO.[17] In June, McDonald's was forced to pay the French government US$1.3 billion, the largest tax fine ever in France, to settle claims over years of profit shifting.[18]

Despite having multiple subsidiaries in Australia, the entity responsible for tax payments in Australia is a foreign property company, incorporated in the secrecy jurisdiction of Delaware, with limited reporting.[19] Based on the most recent (2019/20) ATO corporate tax data, McDonald's ranked 204th of all Australian companies operating in Australia with total income of $1.836 billion. It paid $152 million in corporate income tax. The shifting offshore of royalty/service fee payments reduced tax payments by more than half.[20]

Case Study - Accenture

Recent ATO data for Accenture (since 2016-17) lists total income between $1.8 billion and $2.2 billion per year in Australia, but annual corporate income tax payments below $40 million. This represents an average estimated profit margin of about 5% in Australia, while globally Accenture reported profit margins over the same period of closer to 15%. This appears to be an indication that Accenture shifts significant profits out of Australia to artificially reduce taxable income. Settlements for tax avoidance charges in other jurisdictions seem to indicate a broader global pattern of profit shifting through various service fees and royalties to related parties.

In 2018, Accenture's Australian subsidiary reported related party transactions of nearly $1.1 billion, equivalent to half of its $2.1 billion in revenue. These related party expenses, included $576 million in consulting services, $97 million in international service expense, $8 million in other service expense and $156 million in royalty payments. The pattern continued in 2021 with revenue climbing to $2.3 billion, but pre-tax profit or only $113 million. The $839 million in related party transactions included $527 million of 'purchase consulting services', $178 million in royalty expense, $123 million in international service expense and $11 million in other service agreement expense. Some portion of these expenses may be legitimate business costs, but much of it may be artificial transactions to shift profits to low tax jurisdictions.

Accenture is listed on the New York Stock Exchange but incorporated in Ireland. The Australian business is owned via a Dutch subsidiary. Accenture was initially incorporated in Bermuda. The company, formerly known as Arthur Andersen, re-branded following the infamous collapse of Enron.

---

[16] Costs are estimated at $530.5m by subtracting employee costs of $305.1m from payments to suppliers and employees of $835.6m (p.8 Cash Flow Statement). These costs do not reflect franchisee costs; no disclosure is provided in relation to franchisees costs or service fees associated with franchisees.

[17] https://www.ato.gov.au/Media-centre/Media-releases/McDonald-s-conviction-for-failure-to-comply/

[18] https://www.bloomberg.com/news/articles/2022-06-16/mcdonald-s-agrees-to-pay-1-3-billion-to-settle-french-tax-cases

[19] This entity is McDonald's Australian Property Corporation, it is the entity in the ATO corporate tax data and its 2020 financial statement states (p.3) that it has no employees and "is the provisional head of the company of the multiple entry consolidated ("MEC") group for income tax purposes to which McDonald's Australia Limited belongs". It's Delaware address appears repeatedly in the International Consortium of Investigative Journalists (ICIJ) database of offshore leaks, which include the Panama Papers and the Paradise Papers.

[20] Applying the 30% tax rate to the $602m in service fee payments would produce over $180m in additional tax payments in Australia.

Case Study - Amazon
Amazon has three primary subsidiaries in Australia. Based on ATO data, AWS Australia Pty Ltd, its local cloud computing business is the most profitable with an estimated profit margin of 10% in 2019-20. However, profit margins for Amazon's global AWS segment are 30% or higher. The Australian subsidiary had total income of $600 million and taxable income of $55 million in 2019-20. Some of the AWS revenue in Australia, including from some government contracts, may have been paid directly to a Delaware entity rather than the Australian entity. The 2021 filing of AWS Australia Pty Ltd reported revenues over $1 billion, but "administrative expenses" of $1.1 billion resulted in a reported loss. The subsidiary's related party expenses included a "cloud service fee" of over $223 million and $55 million for intangible assets. These royalty type payments dramatically reduce taxable income in Australia.

Case Study - IBM
IBM's Australian subsidiary is owned via the Netherlands but financed through a "Treasury Services" company in Ireland. This Irish entity, despite funnelling billions to and from subsidiaries around the world, is exempt from filing financial returns. In Australia, IBM has billions in total income, but very little in taxable income and did not pay any corporate income tax for years running. In 2019-20, IBM did have tax payable of $15 million on taxable income of $131 million and total income of $2.9 billion. The 2020 filings of IBM A/NZ Holdings Pty Ltd reveal that in 2019 it made a provision of $28 million to correct underpayments in previous years and that it had "issues under discussion" with the ATO. The Australian subsidiary paid out $363 million in royalty and software license fees in 2020, which were *equivalent to 75% of the company's annual operating costs*. This does not include a "Business Service Fee" expense of $197 million in 2020 paid to other related parties or $100 million in interest on related party debt.

Case Study - Microsoft
According to ATO data, Microsoft's subsidiaries in Australia have an estimated profit margin over the last two years of 7.4%, while its global profit margins over the same period are above 30%. According to the 2021 filing of Microsoft Pty Ltd, its calculated profit margin would be only 4.5% compared to a global profit margin of 42.3%. The Australian subsidiary had 2021 revenue of over $5 billion, with pre-tax profit of $231 million and an income tax expense of $91 million. In 2021, Microsoft's primary Australian subsidiary purchased *over $3.4 billion in goods and services from related parties, equivalent to 70% of its total revenue*. The lack of detail in Australian filings make it hard to determine the related party payments specifically for royalties or service fees. As with other US IT multinationals, the primary Australian subsidiary is owned via an Irish subsidiary, directly owned by another Luxembourg subsidiary. The Irish subsidiary reported income from royalties of US$33.5 billion in 2020.

Case Study - McKinsey
Based on ATO corporate tax data, McKinsey Pacific Rim Inc – McKinsey's Australian subsidiary – has had estimated profit margins of zero to 1% in the last two years. In 2019-20, its total income of $436 million was reduced to taxable income of $3.7 million. It paid $1 million in taxes. In 2020, McKinsey Pacific Rim Inc had a total of $125 million in related party expenses, which included "firm function expenses" of $43 million and royalties of $15 million. A fellow Delaware subsidiary acts as clearing house for global related party transactions. These related party expenses are likely one of the means used to artificially reduce taxable income in Australia. McKinsey currently faces allegations of tax fraud for its operations in France, which have also been heavily reliant on government contracts. Although a global consulting giant, US-based McKinsey is a private company.

Case Study - Oracle
Oracle is currently in a $300 million transfer pricing dispute with the ATO. This may be the largest profit shifting case since the landmark Chevron settlement in 2017 and could indicate profit shifting of nearly $1 billion in income. In 2021, the New Zealand tax authority alleged the Oracle underpaid NZ$20 million in tax between 2012 and 2015, "by overpaying for services supplied by its overseas parent". Oracle's New Zealand filings contain more detail on related party transactions than the Australian filings. In 2021, the New Zealand filings indicate that purchases from offshore related parties made up over 99% of the cost of products sold. The majority of related party transactions were with the Irish parent company and "included sub-license fee and hardware support fees, trading of goods and services, interest charges and purchase accounting entries."

As with other tech giants, Oracle reports global profit margins off above 30%, but the Australian business, on paper and for tax purposes, barely breaks even. In 2021, Oracle Corporation Australia Pty Ltd reported revenue of $1.3 billion but pre-tax profits of below $2.8 million. Related party transactions amounted to $833 million, including $538 million in "Sub-license fee and hardware support fee". Oracle's primary Australian operating company is owned through a complex corporate structure leading to Ireland. The top entities have been non-resident companies, registered in the Isle of Man, and not subject to income tax in Ireland, or anywhere else.

1. Do you consider this policy should apply to SGEs, or should the measure be broader than SGEs, and why?
The measure should apply to more than just SGEs, as the threshold for an SGE is very high at $1 billion revenue. We believe that it should apply to all large businesses as defined by the ATO, with combined turnover of greater than $250 million.[21] Abuse of payments relating to intangibles and royalties to low or no tax jurisdictions is not limited to SGEs.

2. Do you consider this policy should apply to only corporate SGEs, and why?
It should apply more widely than only to corporate SGEs as corporations are not the only entities that abuse payments for intangibles and royalties to low or no tax jurisdictions.

3. Do you consider the policy should seek to cover both royalties and embedded royalties?
The term royalty is notoriously hard to define, and many techniques have been developed to avoid tax by re-characterising payments, including embedding them in payments for tangible goods, or as payments for services. Australia should follow the example of other jurisdictions and implement measures to address tax avoidance involving payments for rights over intangibles which enable, facilitate, or promote Australian sales (in relation to services, goods or other property) directly or indirectly.

We suggest in particular that Australia should consider measures similar to the UK's tax on Offshore Receipts Related to Intangibles (ORIP) of 2019, which applies to gross receipts in offshore jurisdictions from payments for intangibles used directly or indirectly to make sales. This should be designed as an anti-avoidance measure, allowing it to apply in appropriate cases under the anti-abuse provisions of tax treaties. Hence, the test of offshore income could be a specified effective tax rate on the income, for example 80% of the rate that would have applied in Australia, and/or a minimum of 15%, in line with the rate agreed in the BEPS Pillar 2 proposals.

[21] Australian Taxation Office, 'Large business', https://www.ato.gov.au/business/large-business/#:~:text=We%20define%20large%20businesses%20as,partnerships%2C%20trusts%20and%20super%20funds.

5. Do you consider the policy should seek to address reduced Australian profits which has resulted due to migrated intangibles and DEMPE functions?
The policy should seek to address reduced Australian profits which result from migrated intangibles and DEMPE functions related to intangibles.

6. Do you consider any other payments (not related to intangibles or royalties) should also be covered by this policy?
Like the UK Offshore Receipts in respect of Intangible Property (ORIP), the policy should cover all payments not related to tangible property such as land, shares and financial assets (like loan relationships). There is no link back to some concept of intellectual property. The ORIP captures payments such as those in respect of contractual rights like deferred or unascertainable consideration and management service payments. The UK Government reasoned that this was needed to future proof the legislation for unanticipated commercial or technological developments, and to stop MNEs side-stepping the rules.

7. Do you consider the policy should apply to both related and unrelated entities?

8. What are your views in relation to the options outlined above?
The view of the submitting entities is that the test for 'insufficient tax' should be both the 'sufficient foreign tax test' or the presence of an 'intellectual property tax-preferential regime'. The 'hybrid mismatch targeted integrity rule' would set the threshold too low only capturing jurisdictions with a corporate income tax rate of 10% or less. For example, such a threshold would not capture payments to Ireland, Singapore and Hong Kong, which are all key jurisdictions where payments on intangibles and royalties are made to.[22] With the 'Global anti-Base Erosion (GloBE) Rules minimum tax rate, payments to Ireland would be caught, but not those paying the statutory tax rate in Singapore and Hong Kong.

We also oppose trying to put together low or nominal tax jurisdiction lists as there is no global consensus on such lists and many of the existing lists are highly political in terms of the jurisdictions that get excluded from them. The test of 'insufficient tax' needs to be an objective test.

9 & 10. What are your views on the effectiveness or behavioural impacts of other jurisdictions' measures, particularly if Australia were to adopt any similar design features from these measures in the Australian context? What are your views on the compliance or administrative experiences with other jurisdictions' measures, particularly if Australia were to adopt any similar design features from these measures in the Australian context?

We found a limited number of assessments of the impact of the measures that have been implemented in other jurisdictions. Based on the available assessments of measures adopted by other jurisdictions, our greatest fear is that too many concessions will be made to the interests of MNEs resulting in loopholes in the design of measures rendering them largely ineffective in tackling tax avoidance and profit shifting. Of the information available, only the self-assessment of the Netherland Government shows a significant impact on the profit shifting activities of MNEs in relation to royalty and intangible related payments.

It has been argued that the US GILTI acts as a deterrent to profit-shifting only for MNEs that are not shielded from the GILTI tax by excess tax credits from their operations in higher-tax jurisdictions.[23]

[22] https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-database.htm
[23] Kimberly Clausing, 'Taxing Multinational Companies in the 21st Century', Hamilton Project, 2020, 273.

The most comprehensive analysis of the impact of the *Tax Cuts and Jobs Act 2017* containing the GILTI and BEAT produced so far found there is evidence that in response to the law US corporations booked a larger share of profits in the US.[24] The share of profits booked abroad decreased by between 3-5%, to about 27% for all US corporations. The analysis found that Alphabet, Microsoft, Facebook. Cisco, Qualcomm and Nike decreased their share of foreign earnings by over 20%, which appeared related to changes in profit shifting through the repatriation of intellectual property to the US.[25] For example, Alphabet stated in its 2020 annual 10-K filing that:[26]

> *As of December 31, 2019, we have simplified our corporate legal entity structure and now license intellectual property from the US that was previously licensed from Bermuda resulting in an increase in the portion of our income earned in the US.*

The analysis also found that Pfizer, HP, MetLife, Netflix, Abbot Laboratories and Newmont may have reduced their profits booked overseas in response to the measures to curb profit shifting.[27] However, approximately 90% of listed firms in the US with profits over US$10 billion in at least one year in the period 2017 to 2020 did not change their foreign earnings share by 20% or more. Thus, in both dollar-weighted and unweighted terms, the domestic versus foreign profit split appears to have changed little after the introduction of the Act.[28]

The authors of the analysis also point out that in 2020 Ireland phased out its "Double Irish" tax avoidance structure which allowed companies like Alphabet to book income in subsidiaries incorporated in Ireland but taxable in Bermuda. The authors speculate that Alphabet would have probably moved its intellectual property out of its Irish – Bermuda subsidiaries arrangement even in the absence of the *Tax Cuts and Jobs Act*.[29]

At the same time, the analysis found the Act had not significantly affected the geographical allocation of the foreign profits of US MNEs. Across data sources, the share of foreign profits booked in tax havens remained stable at around 50% between 2015 and 2020. The share of domestic and foreign profits booked by US MNEs in tax havens has remained at approximately 13-15% throughout the 2015 to 2020 period.[30] Tax havens were taken to be Bermuda, Ireland, Luxembourg, the Netherlands, Singapore, Switzerland, Puerto Rico, Barbados, Gibraltar, Hong Kong, Isle of Man, Jersey, Malta, Mauritius and the UK Caribbean islands.[31] In the period 2015 to 2020, profits allocated to Bermuda, Jersey, Isle of Man and Gibraltar by US MNEs increased, while the allocation to the Cayman Islands fell.[32]

Clausing (2020) conducted analysis that found the share of US MNEs in tax havens in 2019 was 61% of after-tax income, which was identical to the five-year average prior to the *Tax Cuts and Jobs Act*.[33]

Garcia-Bernardo et al (2022) found that only 4 – 9% of foreign employees and 18 – 23% of foreign tangible assets of US MNEs were located in tax havens. They were mainly located in secrecy jurisdictions that are used for the coordination of profit shifting, such as Ireland,

---

[24] Javier Garcia-Bernardo, Petr Jansky and Gabriel Zucman, 'Did the *Tax Cuts and Jobs Act* Reduce Profit Shifting by US Multinational Companies?', 20 May 2022, 3.
[25] Ibid., 3.
[26] Ibid., 13.
[27] Ibid., 36.
[28] Ibid., 13.
[29] Ibid., 15.
[30] Ibid., 3 - 4.
[31] Ibid., 10, 12.
[32] Ibid., 17.
[33] Kimberly Clausing, 'Profit Shifting Before and After the *Tax Cuts and Jobs Act*', *National Tax Journal,* 3 June 2020, 16.

Singapore and the Netherlands. The shares of foreign employees and foreign tangible assets in tax havens were stable over the 2015 to 2019 period, suggesting no significant changes in patterns of tax competition for production factors.[34]

The US Centre on Budget and Policy Priorities stated in July 2022 that the introduction of GILTI and BEAT had resulted in little impact on the profit shifting activities of US MNEs, due to loopholes in the laws.[35] They assessed that a Bill before Congress would greatly strengthen GILTI by applying its provisions on a country-by-country basis instead of an aggregate basis. Such reform would prevent MNEs from avoiding the tax by 'blending' their taxes and income in low- and high-tax jurisdictions.[36] It would ensure that every dollar of income reported in a tax haven would face the minimum tax rate.[37] The Bill also raises the GILTI tax rate to just over 15%.[38] The Bill has passed the House and is under consideration of the Senate.

NYU law professor David Rosenbloom has argued that the current rule that allows MNEs to calculate GILTI on an aggregate global basis:[39]

> *Creates a great incentive to send investment outside the United States because averaging produces an incentive to go outside the United States. If you are low [that is, if your average foreign tax rate is below GILTI's minimum 10.5% level], you have an incentive to average up by going outside of the United States; if you are high, you have an incentive to go abroad to bring the average down.*

Under the current GILTI design the global averaging feature makes "the US the least desirable place to book income for many multinational companies."[40]

They pointed out that GILTI is also flawed in that it only applies to a MNE's annual foreign income that exceeds 10% of its investment in tangible assets in foreign jurisdictions. The condition gives MNEs an incentive to locate physical investments overseas because the more their foreign tangible property is worth, the lower their GILTI tax will be.[41] The Bill in the Congress would reduce the exemption for income from overseas tangible assets from 10% to 5%.[42]

An alternative suggested reform to GILTI would be to leave the tax as a global minimum but raise the rate to the US corporate income tax rate. The change would remove the tax

---

[34] Javier Garcia-Bernardo, Petr Jansky and Gabriel Zucman, 'Did the *Tax Cuts and Jobs Act* Reduce Profit Shifting by US Multinational Companies?', 20 May 2022, 17-18.
[35] Samantha Jacoby, 'International Tax Reform Proposals Would Limit Overseas Profit Shifting, End "Race to the Bottom"', US Centre on Budget and Policy Priorities, 11 July 2022, 1.
[36] Ibid., 1.
[37] Ibid., 5.
[38] Ibid., 4.
[39] Ibid., 5.
[40] Samantha Jacoby, 'International Tax Reform Proposals Would Limit Overseas Profit Shifting, End "Race to the Bottom"', US Centre on Budget and Policy Priorities, 11 July 2022, 5; and Kimberly Clausing, 'Profit Shifting Before and After the *Tax Cuts and Jobs Act*', *National Tax Journal,* 3 June 2020, 2.
[41] Samantha Jacoby, 'International Tax Reform Proposals Would Limit Overseas Profit Shifting, End "Race to the Bottom"', US Centre on Budget and Policy Priorities, 11 July 2022, 4; and Kimberly Clausing, 'Taxing Multinational Companies in the 21st Century', Hamilton Project, 2020, 251-252.
[42] Samantha Jacoby, 'International Tax Reform Proposals Would Limit Overseas Profit Shifting, End "Race to the Bottom"', US Centre on Budget and Policy Priorities, 11 July 2022, 4.

advantage associated with foreign income relative to domestic income. The approach would also raise substantial US tax revenue and protect foreign non-tax haven bases.[43]

The US Center on Budget and Policy Priorities has stated that the design features of BEAT mean that it effectively only applies where profit shifting transactions account for more than half of a corporation's US profits.[44] BEAT excludes profit shifting transactions that relate to the cost of inventory.[45] The Bill before the Congress reforms the BEAT by making more types of transactions subject to the BEAT penalties and raising the applicable penalty tax rate.[46]

A survey of German corporations with exposure in the US found that 8% expected to pay more tax in the US as a result of more restrictive treatment of R&D spending from 2022 onwards and the impact of BEAT and GILTI.[47] However, a survey of businesses found almost no corporations planned to adjust the location of their intellectual property in response to the introduction of GILTI and BEAT.[48]

The Netherlands Government has claimed spectacular success in curbing financial flows from the Netherlands to low tax jurisdictions. The claims would need to be verified. The Netherlands Government has stated that based on provisional figures, the total flow of income to such jurisdictions has fallen by almost 85% from €38.5 billion in 2019 to approximately €6 billion in 2021. They have stated the reduction is due to out-going interest and royalty payments to low-tax jurisdictions falling from €36.4 billion in 2019 to a provisionally estimated €1.5 billion in 2021.[49] The Netherlands Government also stated that from 2024 they expect to see these flows further reduced with the coming into force of a new withholding tax. From 2021 a withholding tax on interest and royalty payments was introduced. It applied to jurisdictions with a corporate tax rate of less than 9% and to jurisdictions on the EU list of non-cooperative jurisdictions. In 2021, the withholding tax generated €51 million in revenue for the Netherlands Government. As of 2024, it will be extended to dividend payments.[50]

Andersen Tax has offered public advice to corporations that the UK ORIP has a bark that is worse than its bite, suggesting that it is relatively ineffective.[51]

Part 3: Multinational tax transparency

Questions 1-3

We strongly support the introduction of public country by country (CbC) reporting for all multinationals operating in or generating income in Australia. As described and explained

[43] Kimberly Clausing, 'Taxing Multinational Companies in the 21st Century', Hamilton Project, 2020, 272.
[44] Samantha Jacoby, 'International Tax Reform Proposals Would Limit Overseas Profit Shifting, End "Race to the Bottom"', US Centre on Budget and Policy Priorities, 11 July 2022, 5.
[45] Ibid., 5 – 6.
[46] Ibid., 6.
[47] Dorine Boumans, Clemens Fuest, Carla Krolage and Klaus Wohlrabe, 'Expected effects of US tax reform on other countries: global and local survey evidence', *International Tax and Public Finance,* **27,** (2020), 1618-1619.
[48] Ibid., 1623.
[49] Netherlands Ministry of Finance, 'Tax avoidance via the Netherlands significantly reduced thanks to measures', 28 June 2022, https://www.government.nl/latest/news/2022/06/28/tax-avoidance-via-the-netherlands-significantly-reduced-thanks-to-measures
[50] Ibid.
[51] Zoe Wyatt, 'Offshore receipts in respect of intangibles – bark worse than bite?', Andresen Tax, 4 June 2020, https://uk.andersen.com/offshore-receipts-in-respect-of-intangibles-bark-worse-than-bite/

further below, the Global Reporting Initiative's (GRI) Tax Standard (GRI 207) should be used as the standard template for all reporting.

The current definition of a Significant Global Entity would be appropriate to use as a prompt to require mandatory public CbC reporting. Consideration could be given in the future to reducing the threshold for increased reporting and ensuring that large global investors (global pension and private equity fund investors) with significant private investments are included. Legislation to implement public CbC reporting for multinationals could include a review after two years on the impacts of reporting, further international expansion of public CbC reporting and consideration of whether the revenue threshold, or other changes, should be made to extend coverage of public CbC reporting requirements.

All multinationals that currently report confidential CbC reporting under Action 13 of the OECD's BEPS Action Plan should be required to begin mandatory public reporting as of the implementation date of new legislation based on existing reporting schedules immediately following implementation. In Australia, Significant Global Entities – including some that may not be covered under OECD requirements for CbC reporting – are already required to comply with confidential OECD CbC reporting. If Australia were to reduce the revenue threshold for required public CbC reporting in the future, a phase in approach may be appropriate for entities that have not previously reported under confidential OECD CbC reporting requirements.

Questions 4-5

Australia should not use the EU's flawed approach to public CbC reporting. The EU mandated public CbC reporting only in EU member states and in a selected and problematic EU tax blacklist. The current EU "list of non-cooperative jurisdictions for tax purposes" includes only eight jurisdictions and is heavily weighted toward small Pacific Island nations, including Fiji, Palau, Samoa and Vanuatu (it also includes US territories in the Pacific of American Samoa and Guam). These jurisdictions, unlike other much more heavily utilised tax havens and secrecy jurisdictions elsewhere, do not have the political lobbying power to get off this flawed EU list. The approach to public CbC ultimately adopted by the EU excludes most global jurisdictions and, by definition, is not on a country-by-country basis. The UNPRI coordinated a letter from global investors calling for the EU to provide full public CbC reporting using the GRI Tax Standard and disaggregating for each jurisdiction in which a multinational operates globally.

As indicated above, most jurisdictions widely considered to be tax haven or secrecy jurisdictions are excluded from the EU tax blacklist. This may create perverse incentives for some jurisdictions to encourage or support existing or new tax haven practices and for multinationals to artificially restructure to adjust to these changes and continue aggressive tax avoidance practices that these measures are intended to address. While the EU approach is problematic for the 27 member states, the territorial approach to reporting is completely inappropriate for Australia and its much smaller economy.

The additional tax disclosures which could supplement the EU CbC approach (discussed in Question 5) are already incorporated into the GRI Tax Standard.

Questions 6-7

The GRI tax standard should be used as a basis for Australia to mandate public CbC reporting. The GRI standard was developed with broad global consultation with a diverse group of experts and stakeholders. Global investors holding over US$10 trillion in assets under management submitted letters and comments in broad support of the GRI Tax Standard. It is the only CbC template specifically designed for public reporting. Many multinationals are already using the GRI Tax Standard, which is relatively new, and many other companies use other GRI standards for reporting on sustainability and a range of other

issues. The GRI is widely regarded for developing global reporting standards that can be applied to a wide variety of entities.

The GRI Tax Standard is close enough to the OECD's BEPS Action Plan 13 confidential CbC reporting requirement that there are minimal compliance costs in using the GRI Tax Standard. The GRI Tax Standard makes significant improvements on the OECD approach that should provide benefits to both reporting entities and those analysing or using the publicly reported information. Public reporting under the OECD framework could include information that might be misinterpreted when there are legitimate reasons for lower effective tax rates. GRI 207 provides more opportunities for multinationals to explain tax practices and reported figures that might attract initial public scrutiny without further explanation. GRI 207 requires separate reporting for related party and third-party transactions in each jurisdiction. GRI 207 also requires broad reporting on worker costs (direct and indirect employees) and payroll information in each jurisdiction that provides a useful metric for determining genuine economic activity.

As mentioned above, a starting point for requiring public CbC reporting under the GRI Tax Standard should be the existing definition of a Significant Global Entity with the possibility of expanding the scope over time. This requirement is consistent with current reporting requirements under the OECD confidential CbC reporting in Australia and broadly aligned with the reporting threshold in OECD requirements relevant to other jurisdictions and with the EU CbC approach. Given the similarities with existing requirements for OECD confidential CbC reporting, any additional compliance costs will be minimal. These minimal compliance costs must also be considered in the context of applying only to entities with a billion or more in annual global revenue.

It is widely believed amongst global tax experts and practitioners that mandatory public CbC reporting is inevitable and necessary. The EU has moved part way there and its CbC reporting requirements apply to all large multinationals operating in the EU, regardless of the home country of the multinational. Legislation to require public CbC reporting has passed the US House and discussions on rulemaking to require public CbC reporting are ongoing in the US Securities and Exchange Commission (SEC) and the US Financial Accounting Standards Board (FASB). Australia has an opportunity to set a global standard by requiring public CbC reporting under the GRI Standard, which will undoubtedly be followed by many other jurisdictions.

Using GRI 207 provides a standardised format for all reporters, which makes analysis of the data much easier within sectors and between companies. Data from different reporters can be easily compared and understood in context. The GRI also has reporting standards that are catered to variations between different economic sectors or industries, including extractives.

Although not referenced in this consultation paper we would urge the Australian government to immediately seek to meet or exceed emerging global reporting standards for corporations in extractive industries. Mandatory disclosure policies, which require public project by project reporting, are already in place in many other OECD nations including Canada, UK, Norway and the EU. Australia should also join the globally recognised Extractive Industries Transparency Initiative (EITI) which the government has supported globally but never implemented in Australia. Australia's largest extractive companies, including BHP and Rio Tinto, are already covered by these requirements and would likely welcome the Australian government matching these existing global standards and leveling the playing field for companies across the sector. Many smaller ASX listed mining companies also have extensive global operations.

Questions 8-9
The voluntary Tax Transparency Code does not have a standardised reporting format, is not widely used by corporations to report tax information and is not particularly useful in most cases to analyse tax information. The Tax Transparency Code should be abandoned and replaced with a mandatory requirement to publicly report under GRI 207.

Questions 10-15
Entities should be encouraged to publish public CbC reporting (using the GRI tax standard) in annual reports. The timing of reporting should be consistent with an entity's existing annual reporting schedule. Including the CbC reporting in the annual report would require it to be audited along with the presentation of other financial information. However, the Australian government (most likely the ATO), must also be a centralised repository for all CbC reporting. This reporting most be in a standardised format, easily accessible, searchable and machine readable. The Australian Government's Online Register for Modern Slavery Statements, may provide a model for submitting and hosting CbC reporting from all entities.

An Australian government run CbC reporting register could include an indication of whether the CbC reporting has been independently audited or not and if so, by whom. Auditor disclosure is required for annual reports and annual financial statements. If not independently audited an entity's board members and/or CFO must be required to take personal responsibility for accuracy. These measures would be a strong incentive for entities to have an independent audit of CbC reports. There is no requirement with the GRI Tax Standard for an independent audit. The GRI does not itself audit, verify, collect or catalogue reporting under any GRI reporting standard.

The ATO should verify consistency between current confidential CbC reporting under OECD BEPS Action 13 and public CbC reporting under the GRI standard. Given that the ATO already reviews and utilizes the OECD confidential CbC reports there should not be a major increase in ATO staff time needed to complete a review for consistency. An entity could be given an opportunity to explain and correct any discrepancies that may be identified.

Transitional arrangements are not likely to be needed given that all Significant Global Entities are already reporting under the confidential OECD CbC reporting measures in Australia. There are important differences between the OECD and GRI reports, but nothing that would present any significant compliance burden for entities with over a billion in global revenues.

Questions 16-20
These proposed reporting requirements are largely relevant for ASX listed companies. However, some of these proposals could be added as required disclosure for Australian subsidiaries of foreign-owned companies as part of annual financial statements filed with ASIC, where appropriate. The GRI Tax Standard does include supplemental guidance on reporting on tax disputes. This reporting should be included in public CbC reports following the GRI standard.

Prior to the 2017 Tax Cuts and Jobs Act (TCJA) in the US under the Trump Administration, the SEC required reporting of non-repatriated profits indefinitely held offshore. This reporting requirement was a useful metric for shareholders, and the general public, to understand global cash holdings and tax practices of public companies. A similar reporting requirement could be required for Australian listed companies with significant international operations.

Rather than a requirement for entities to disclose if they are doing business in a low-tax jurisdiction, it should be a requirement for all ASX listed companies to disclose a complete list of all subsidiaries. This reporting is already required for companies listed on the London

Stock Exchange, but US and Australian corporations are only required to report subsidiaries that management has deemed to be "material". The reporting of only "material" subsidiaries does not provide a complete or comprehensive picture of global corporate structures. Frequently layers – and sometimes multiple layers – of corporate ownership via holding companies, are not reported as subsidiaries. These holding companies have not been deemed as "material" even with ownership of operating companies that are disclosed. The definition of material in this case is highly subjective.

Reporting of all subsidiaries should include, at least, the following basic information:

- Complete and full legal name
- Jurisdiction of incorporation (and if relevant, branches or registration in any other jurisdiction)
- Percentage ownership
- Primary purpose of entity (ie. holding company, operations, finance, dormant, etc…)

ASX listed companies should be required to disclose self-assessments of all relevant ATO Practical Compliance Guidelines (PCG) in annual reports. The disclosure should contain which risk category the company falls in, under each relevant PCG and whether or not any self-assessments fall into a high-risk category. Shareholders should have the right to know of tax risks based on these guidelines. Companies should also be required to report the existence of Advance Pricing Agreements, tax exemptions, tax holidays or other agreements with tax authorities that impact all tax payments, including property taxes, sales taxes, royalties, production sharing agreements and/or any other forms of income or non-income tax, in Australia or any other jurisdiction. These requirements could be extended to private subsidiaries of foreign multinationals that are considered part of Significant Global Entities as an annex to annual financial statements filed with ASIC.

For all the measures above, pertaining to ASX listed companies, there is no reason to have any threshold. If the disclosure requirements are not relevant, stating the lack of relevance is sufficient. There should be a requirement for all ASX listed companies to review and disclose all relevant information in annual reports. Given that these types of reviews are already conducted, there would be a minimal increased burden of compliance, but a potentially significant increase in what is publicly reported to shareholders. Increased transparency will benefit all shareholders of ASX listed companies. If the minimal increase in transparency deters any company for listing on the ASX than it is likely the company has something to hide from shareholders. These requirements, if contained in annual reports and/or annual financial statements, would be subject to an independent audit.

Questions 21-25

In relation to additional disclosure requirements for government tenderers, we note that there is a further Treasury consultation on this subject and look forward to making a more detailed submission. In general, the market power of government procurement can and should be used to encourage transparency and responsible corporate behaviour in government tenderers and across the broader market. Multinationals with a track record of tax avoidance, in Australia and globally, should not be rewarded with contracts or grants funded by other taxpayers. Additionally, when multinationals with a track record of tax avoidance are awarded government contracts it puts smaller companies and those with more responsible tax practices at a significant competitive disadvantage.

The broader economic impacts to the Australian economy, particular in terms of tax payments, job creation, technology transfer and innovation, multiplier effects and other impacts, should be considered as part of the procurement process. The availability of public

CbC reporting will help improve procurement decisions by allowing information, not currently publicly available, to be a factor in awarding government tenders.

As a supplement to disclosing an entity's tax residency status as part of the tender process, an agreement to implement public CbC reporting under the GRI tax standard within 6 months of any new contract awards could be considered for any Significant Global Entity. This could accelerate reporting before the implementation of a mandatory requirement and be useful in shifting corporate behaviour or discourage corporations that are not willing to be transparent for tendering for government contracts.

In relation to the government's proposal to require all firms tendering for Australian Government contracts over $200,000 to state their country of domicile for tax purposes, this should apply not only to contracts but other forms of government funding. For example, funding for aged care, childcare or disability services that may not be in the form of a contract or a typical tender process should be included. The tax residency status should be used as the definition of 'tax domicile', but must not be restricted to country, but a broader definition of jurisdiction. For example, a US entity should disclose which US state (i.e. Delaware). There are 'tax haven' jurisdictions within other countries, including Malaysia, or previous jurisdictions in Australia, such as Norfolk Island. The requirement must be clear that it applies to the specific entity which will be directly paid from government funds and the corporate structure through which tax payments will be made or whether the entity is a non-profit and not liable for income tax payments. Is the entity part of a tax consolidated group and where is the head of the group located?

For the vast majority of entities, these requirements will be minimal as tax payments will be made in Australia through clear and simple structures. The increase requirement for transparency may deter entities with complex global structures designed to reduce or avoid tax payments in Australia from tendering for government contracts or services.

The consultation paper also references the existing requirement for federal government contracts estimated at over $4 million to obtain a Statement of Tax Record (STR) from the ATO. When this legislation was passed, it required a review after one year. To our knowledge, no such review has been conducted and should be commenced immediately. The law sets an important precedent, but the bar to obtain an STR is far too low and needs to be lifted. In addition to the STR there should be a requirement to disclose if there have been or continue to be any significant disputes with the ATO or other tax authorities within the last three years and whether or not those disputes have been resolved. This should apply to the immediate entity seeking the contract as well as the broader corporate body. Model language as suggested was used in a tender document from the Department of Home Affairs in relation to contracts for visa processing services. The wholesale outsourcing of visa processing under this tender agreement was ultimately abandoned.

For the vast majority of entities, this proposal would not present a significant increased compliance burden. However, it may deter entities with a track record of tax avoidance from tendering. It is possible that strengthening the existing requirements may be more effective and easier for the government to implement – and for entities to comply with – than the requirement for reporting tax residency status at a lower threshold of $200,000.

Thank you for the opportunity to provide this response to Treasury's consultation paper on this extremely important issue and we stand by to answer any questions or provide any further information.

Jason Ward
Principal Analyst
CICTAR
Phone: 0488 190 457
@JasonWardCICTAR
Email: jason.ward@cictar.org

Dr Mark Zirnsak
Secretariat
Tax Justice Network Australia
c/- 29 College Crescent
Parkville, Victoria, 3052
Phone: 0409 166 915
E-mail: mark.zirnsak@victas.uca.org.au

Acknowledgement: TJN-Aus and CICTAR acknowledge the invaluable support Hamish Clarke and Professor Sol Picciotto provided in assisting with and contributing to this submission.

Background on the Centre for International Corporate Tax Accountability & Research (CICTAR)

CICTAR is a global corporate tax research centre that produces information and analysis to untangle the corporate tax web. The Centre is a collective resource for workers and the wider public to understand how multinational tax policy and practice affects their daily lives. CICTAR's work supports public participation in the tax debate so that everybody can take part in decision-making that affects their communities.

For more information, visit the CICTAR website here: https://cictar.org/

Background on the Tax Justice Network Australia

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN) and the Global Alliance for Tax Justice. TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network aims to:

(a) promote sustainable finance for development;
(b) promote international co-operation on tax regulation and tax-related crimes;
(c) oppose tax havens;
(d) promote progressive and equitable taxation;
(e) promote corporate responsibility and accountability; and
(f) promote tax compliance and a culture of responsibility.

In Australia, the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Anglican Overseas Aid
- Australian Council for International Development (ACFID)
- Australian Council of Social Service (ACOSS)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union (AEU)
- Australian Manufacturing Workers Union (AMWU)
- Australian Nursing & Midwifery Federation (ANMF)
- Australian Services Union (ASU)
- Australian Workers Union, Victorian Branch (AWU)
- Baptist World Aid
- Caritas Australia
- Centre for International Corporate Tax Accountability & Research (CICTAR)
- Community and Public Service Union (CPSU)
- Electrical Trades Union, Victorian Branch (ETU)
- Evatt Foundation
- Friends of the Earth (FoE)
- GetUp!
- Greenpeace Australia Pacific
- International Transport Workers Federation (ITF)
- Jubilee Australia
- Maritime Union of Australia (MUA)
- National Tertiary Education Union (NTEU)
- New South Wales Nurses and Midwives' Association (NSWMWA)
- Oaktree Foundation
- Oxfam Australia
- Save the Children Australia
- Save Our Schools
- SEARCH Foundation
- SJ around the Bay
- Social Policy Connections
- TEAR Australia
- The Australia Institute
- Union Aid Abroad – APHEDA
- United Workers' Union (UWU)
- Uniting Church in Australia, Synod of Victoria and Tasmania
- UnitingWorld
- Victorian Trades Hall Council
- World Vision Australia