BCA
Business Council of Australia

Submission to the consultation on the exposure draft for public country-by-country reporting

BCA Submission

April 2023

Contents

1. Overview

The Business Council welcomes the opportunity to provide a submission to the consultation on the exposure draft for public country-by-country (CbC) reporting.

All companies must meet their tax obligations and where arrangements do not keep pace with community norms, they should be reviewed. The BCA strongly believes all companies and individuals must meet their tax and legal obligations, and will continue to actively encourage member companies to adopt the Tax Transparency Code. Robust tax integrity and transparency measures are an integral complement to more competitive business tax arrangements.

Australia has some of the strongest tax integrity rules in the world, and they have been strengthened over time.[1] Existing integrity measures, institutions and enforcement all contribute towards and complement a high level of compliance with our tax system. The Australian Taxation Office (ATO) is a strong, capable, active and well-resourced administrator, with extensive powers and a strict interest and penalty regime. The ATO workforce focused on large companies is "larger and more skilled than it has ever been", and it has one-to-one engagement with large companies for assurance over approximately two-thirds of all corporate tax (over $60 billion).[2]

The proposed changes will significantly expand tax transparency requirements for large companies operating in Australia. The BCA has previously proposed that tax transparency disclosures be guided by a set of principles. This ensures stakeholders are better informed through meaningful data, commercial confidentiality is maintained, compliance costs are minimised and there is consistency with international reporting obligations is preserved. The proposed changes fail to align with these principles.

It is unclear how the proposed reporting will deliver a more informed debate about the tax affairs of large companies. The proposed reporting will sit alongside several other public reporting measures in Australia and internationally, each with different quantitative and qualitative data published for different purposes. Misinterpretation and misrepresentation of facts can unnecessarily undermine the community's confidence in the integrity of our tax system and distort any debate. This does not assist the government in assuring the public that everyone is paying the right amount of tax. The proposed changes also undermine Australia's participation in the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting and other multilateral commitments.

The data will also presumably be accessible via spreadsheets that are impenetrable for most potential users. To illustrate, the ATO uses its own expertise, experience and knowledge alongside its powerful and extensive information-collecting abilities to currently analyse much of this data, including through the OECD's confidential CbC reporting initiative. This is to better understand companies, their tax arrangements and ensure the right amount of tax is paid. For large companies, this is done on a company-by-company basis. The ATO notes "our tax gap or tax performance program therefore demonstrates that the current state of the tax system in Australia is in good shape. We have one of the strongest corporate tax compliance levels in the world."[3]

The proposed changes will significantly increase the cost of doing business in Australia, alongside several tax and other related measures. It is critical to maintain a competitive business environment overall, while signalling to investors that Australia is open for business.

---

[1] Commonwealth of Australia, Treasury, *The Digital Economy and Australia's Corporate Tax System*, Treasury Discussion Paper, October 2018.
[2] https://www.ato.gov.au/General/Tax-and-Corporate-Australia/We-are-an-active-and-capable-administrator/
[3] https://www.ato.gov.au/Media-centre/Speeches/Other/Tax--the-silent-T-in-ESG/

2. Key recommendations

1. Tax transparency disclosures should be guided by a set of principles that genuinely ensure stakeholders are better informed through meaningful data, commercial confidentiality is maintained, compliance costs are minimised and there is consistency with international reporting obligations.
2. Tax transparency proposals should align with the EU approach to CbC reporting following further consultation, including for implementation timelines, provision of safeguards for commercially sensitive data and aggregation of jurisdictions outside of Australia.
3. Provide taxpayers with the flexibility in how they publish tax transparency requirements. For example, this could be within financial statements or as a standalone publication, rather than a centrally hosted database.
4. While tax transparency reporting should align with the EU approach, any reporting requirements should similarly not go beyond Global Reporting Initiative's (GRI) Sustainability Reporting Standard GRI 207.
5. Any proposed tax transparency changes should consider a materiality threshold and apply no earlier than the first income year commencing from 1 July 2024, broadly consistent with EU CbC reporting.
6. A cost-benefit analysis of the proposed changes must consider the direct and indirect costs of compliance for both taxpayers and the ATO.
7. Legislation for any proposed tax transparency fields should clearly identify which reporting guidance to follow.
8. Do not require reporting of an effective tax rate, particularly one based on Pillar Two.
9. Do not proceed with the regulation-making power that allows for increased reporting without parliamentary approval.
10. Any proposed changes should be subject to a comprehensive assessment that follows best practice principles. This includes the problem to be solved must be well understood, new regulation is subject to cost–benefit analysis, adequate time for consultation and regulation must achieve objectives at least cost.

3. Additional information

3.1 Principles for tax transparency

The BCA has previously proposed that tax transparency disclosures be guided by a set of principles. This ensures stakeholders are better informed through meaningful data, commercial confidentiality is maintained, compliance costs are minimised and consistency with international reporting obligations is preserved. These principles are relevant in the context of the proposed changes and include:

- The information provided should be meaningful and better inform the public. This information can be both qualitative and quantitative in nature.
- Compliance costs should be minimised.
- There should be scope for flexibility in how firms provide tax transparency disclosures, such as in how the information is presented, recognising there is no 'one size fits all' approach.
- There should be consistency between domestic and international transparency and reporting measures. This includes clear equivalence provisions between jurisdictions to minimise the reporting burden and costs for companies operating in multiple jurisdictions.

The proposed changes fail to align with these principles. The proposed reporting requirements:

- will not be delivered in a meaningful way or better inform the public

- *maximise* compliance costs
- do not provide flexibility
- are *inconsistent* with other domestic and international transparency and reporting measures.

Recommendation 1

Tax transparency disclosures should be guided by a set of principles that genuinely ensure stakeholders are better informed through meaningful data, commercial confidentiality is maintained, compliance costs are minimised and there is consistency with international reporting obligations.

3.2 Tax transparency must be meaningful and better inform the public

3.2.1 Current tax transparency disclosures

The tax affairs of large companies are currently published through a variety of information sources. The information disclosed differs across each source as the purpose of each disclosure differs. Some of the information is provided voluntarily by taxpayers or in line with investor/tax reporting requirements, while some of it is published by third parties, such as tax authorities. Examples include:

- The ATO's corporate tax transparency release
- Publication of tax transparency reports
- Public reporting within annual reports/financial statements
- The European Union's public CbC reporting directive.[4]

Tax reporting can also be based on Generally Accepted Accounting Principles, International Financial Reporting Standards, the Tax Transparency Code and/or the GRI 207 reporting standards.

Whether these data are analysed on their own or collectively, it can be inherently complex to understand a company's tax affairs – even in the simplest of circumstances. This becomes more complex where company supply chains or operations are disaggregated across the globe. The ATO uses its own expertise, experience and knowledge alongside its powerful and extensive information-collecting abilities to better understand companies, their tax arrangements and ensure the right amount of tax is paid. This is done on a company-by-company basis and the ATO observes "we have one of the strongest corporate tax compliance levels in the world."[5]

At the same time, the ATO's annual publication of corporate tax transparency data includes the publication of total income, taxable income and tax payable. On their own, these data are not meaningful, so the ATO accompanies the release with contextual analysis to help users better understand and interpret the data. Similarly, some companies publish tax transparency reports and/or media releases to help explain and contextualise the reported figures.

3.2.2 Proposed tax transparency disclosures

The draft Explanatory Memorandum states the proposed tax transparency disclosures intend to improve "the quality and comparability of tax disclosures by large businesses in Australia, by introducing standardised reporting requirements". This is intended to be facilitated by requiring the reporting to be "in a standardised format and be centrally hosted". But this will not deliver tax transparency that is meaningful or better informs stakeholders. At the same time, the "standardisation" referred to here only addresses reporting in Australia.

[4] Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021
[5] https://www.ato.gov.au/Media-centre/Speeches/Other/Tax--the-silent-T-in-ESG/

If there is a genuine to desire to improve tax transparency and better inform the debate, the starting point must be to rationalise any proposed reporting measure with existing reporting measures rather than a unilateral approach. The requirement to report more – and different – data will not better inform stakeholders without further context or consistency with other reporting measures. Nor will it help better inform stakeholders whether the "right" amount of tax is paid. Inconsistent reporting standards will lead to poorer policy debates than lower, universal standards because the inconsistency itself creates the potential for flawed comparisons and misguided conclusions.

Table 1 Comparison of current and proposed tax disclosure measures

	ATO corporate tax transparency	Australia public CbC	OECD confidential CbC	EU public CbC	GRI 207
Name of entities in group		✓	✓	✓	✓
Description of approach to tax		✓			✓
Description of main business activities		✓	✓	✓	✓
Employees		✓	✓	✓	✓
Total income	✓				
Total revenue			✓	✓	
Revenue from unrelated parties		✓	✓		✓
Revenue from related parties		✓	✓		✓
Expenses from related parties		✓			
Taxable income	✓				
Profit/loss before tax		✓	✓	✓	✓
List of tangible assets		✓			
Value of tangible assets		✓	✓		✓
List of intangible assets		✓			
Value of intangible assets		✓			
Tax payable	✓				
Income tax paid (cash basis)		✓	✓	✓	✓
Income tax paid (accrual basis)		✓	✓	✓	✓
Effective tax rate		✓			
Profit and tax reconciliation		✓			✓
Stated capital			✓		
Accumulated earnings			✓	✓	
Jurisdiction	Australia	All	All	EU; Non-cooperative jurisdictions; Aggregated for rest	All

3.2.3 Transparency should be consistent with EU CbC

The EU standards for CbC reporting provide a suitable template for a similar approach to further tax transparency in Australia, including for implementation timelines. The EU standards have been through rigorous consultation, mindful of the confidentiality around existing CbC disclosures, and can deliver on the original policy intent to publish tax paid and employment data by jurisdiction, while minimising compliance costs for companies (discussed further below).[6]

The confidentiality of existing CbC reports as per Australia's international obligations under Action 13 of the OECD/G20 Base Erosion and Profit Shifting Project is critically important. The cross-border sharing of these reports is used by tax administrators around the world in their tax risk assessment and assurance processes.

The draft Explanatory Memorandum states that "these amendments create a separate public reporting obligation" but do not contravene Australia's international obligations. However, the proposal to publish this data under a different guise contravenes the spirit of Australia's international obligations. It also effectively makes EU CbC reporting redundant – and ignores the extensive international political negotiations that accompanied the establishment of this system. To proceed with this approach may negatively impact Australia's relationships with other countries, perceptions around Australia's commitment to multilateral agreements and the willingness of other countries to continue to share CbC reports with Australia.

Furthermore, the EU's CbC standards adopt a practical approach where entities may not have access to the data of related offshore entities that are not under its control. By contrast, the Australian approach is to issue penalties irrespective of whether or not companies can comply with the proposed law.

The EU directive requires separate disclosure of each EU member state together with those jurisdictions deemed to be non-cooperative tax jurisdictions. The rest of the world data is then aggregated. In line with the EU directive, the information to be disclosed should be limited to Australian operations and countries deemed to be non-cooperative tax jurisdictions with the rest of the world aggregated.

Unlike the EU Directive, there does not appear to be any safeguards to protect against disclosure of commercially sensitive data regarding a businesses' operations. While there is reference to allowing exemptions, there is no clarity on what might qualify for an exemption, and it appears to be at the discretion of the Commissioner of Taxation. Such disclosure could harm the competitive position of Australian businesses competing overseas against offshore competitors not subject to these disclosure requirements.

Recommendation 2

Tax transparency proposals should align with the EU approach to CbC reporting following further consultation, including for implementation timelines, provision of safeguards for commercially sensitive data and aggregation of jurisdictions outside of Australia.

3.2.4 The centrally hosted database will not better inform the debate

The proposed centrally hosted database would not by itself help better inform stakeholders whether the "right" amount of tax is paid. For example, the up to 17 proposed fields could sit across more than 100 jurisdictions in some cases. Similarly, large multinationals may have over 1,000 entities within their reporting group – and hundreds of thousands of tangible/intangible assets to be listed. The population of reporting companies is unclear but likely to be over 1,000.[7] This database would grow each year. This would represent an enormous data set with millions of data points manageable by only a handful of sophisticated users with the expertise or technical knowledge to analyse the data – let alone interpret it. There is already evidence of this with the Payment Times Reports Register, which represents an enormous database that is difficult for users to access, analyse and interpret.

Simply put, it is unclear how the proposed CbC reporting requirements will provide meaningful information to better inform stakeholders – be they the general public or investors – about whether the "right" amount of tax is being paid. There is an obvious risk that this transparency proposal delivers higher compliance costs while any purported benefits may not materialise.

[6] https://web.archive.org/web/20221004191508/https://www.alp.org.au/policies/labors-plan-to-ensure-multinationals-pay-their-fair-share-of-tax

[7] Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015, Explanatory Memorandum

This is not an argument against transparency, but it is an argument for *meaningful* transparency. To that extent, a genuine desire for transparency and a better-informed debate should offer flexibility in how these data are published. For example, annual reports or tax transparency reports offer a place for stakeholders genuinely interested in the tax affairs of companies to access this information. It also provides companies with an opportunity to explain and contextualise their tax affairs, maximises the utility of the information for users and minimises compliance costs for companies.

Recommendation 3

Provide taxpayers with the flexibility in how they publish tax transparency requirements. For example this could be within financial statements or as a standalone publication, rather than a centrally hosted database.

3.2.5 The proposed disclosure goes beyond stakeholder demands

GRI 207 was developed through a comprehensive, multistakeholder committee of representatives from business, labour, civil society, investors, and mediating institutions.[8] It is unclear why the proposed disclosures go well beyond these standards or that the majority of investors demand tax transparency data of this nature. To illustrate, BCA analysis of ASX100 companies finds:

- Almost 80 per cent have adopted the GRI framework in some capacity
- Around 20 per cent have adopted GRI tax standards in some capacity
- Around 10 per cent have adopted, or intend to adopt, GRI tax standards in full.

The success of the broader GRI framework has been based on the flexibility for stakeholders to pick the relevant standards that matter to their stakeholders and offering a consistent reporting approach.

Recommendation 4

While tax transparency reporting should align with the EU approach, any reporting requirements should similarly not go beyond GRI 207 reporting standards.

3.3 The proposed changes do not minimise compliance costs

The draft Explanatory Memorandum outlines the extent and nature of reporting requirements is designed to minimise the compliance and administrative burden. This claim is difficult to reconcile (see Table 1).

As previously discussed, companies already comply with several existing reporting measures. The proposal introduces another unique reporting measure with additional, detailed reporting requirements. By any reasonable interpretation, this approach appears to *maximise* compliance costs – putting aside the utility of the information or Australia's commitment to confidentiality of CbC reports under BEPS Action 13. For example:

- Companies that report under GRI 207 in full – only around 10 per cent of the ASX100 – will have to provide significant additional information in a different format to their existing reporting.
- The proposal to list tangible and intangible assets could result in potentially hundreds of thousands of assets being reported for each entity in a reporting group. This proposal gives little thought to notions of compliance costs, practicality, materiality, commercial confidentiality or critical infrastructure assets and related security concerns.

Initial feedback from BCA member companies is that compliance costs will be significantly high – regardless of whether companies already report under GRI 207. This will be further compounded by the imminent start date as companies that have implemented GRI 207 in full have observed the large amount of time and effort to do so. One company has also observed it will need to dedicate significant additional resources to comply with the

[8] https://www.globalreporting.org/media/mglcrtz2/gri-tax-tc-member-bios_updated.pdf

unique requirements of this proposal. These additional resources could be alternatively used to develop new products or services, undertake new investments and/or train/upskill workers.

The draft Explanatory Memorandum provides exemptions for government-related entities from reporting, noting they "are subject to alternative disclosure or accountability regimes through government budget processes". This is similarly the case for proposed reporting entities under both domestic and offshore reporting requirements. For example, some of the information is already publicly available in Form 10-K for US based multinationals.

The proposal does not appear to have a materiality threshold for any of the data required to be published. This will increase compliance costs while not necessarily helping stakeholders interpret or understand the published data, such as data for immaterial jurisdictions. One approach could be to limit disclosure to the largest jurisdictions covering an aggregate 80 per cent of revenue and profit before tax.

The EU's CbC reporting measure commences at the latest from "the first financial year starting on or after 22 June 2024." This allows time for the necessary changes to systems, administrative processes, the compilation of data and auditing – particularly for the initial reporting period. This is particularly an issue as there is a significant discrepancy in the start date between the draft legislation and draft Explanatory Memorandum. Rushing this implementation will compound compliance costs – as well as practical compliance issues.

Recommendation 5

Any proposed tax transparency changes should consider a materiality threshold and apply no earlier than the first income year commencing from 1 July 2024, broadly consistent with EU CbC reporting.

Beyond the direct compliance costs, indirect compliance costs will also increase as many taxpayers will also publish additional explanatory materials for stakeholders to understand the disparity between the various tax transparency measures. There will also be additional administrative costs for the ATO to collect, process and publish the data – as well as any contextual analysis that should accompany any release. For example, the ATO publishes extensive analysis that accompanies the annual corporate tax transparency release.[9] If the proposal is to proceed in its current form, the ATO should publish similar analysis, recognising this will be an enormous and complex exercise in its own right.

Recommendation 6

A cost-benefit analysis of the proposed changes must consider the direct and indirect costs of compliance for both taxpayers and the ATO.

3.3.1 Clarity around which reporting guidance to follow

The draft Explanatory Memorandum outlines that "regard should be had to both the OECD CbC reporting guidance and GRI 207 in interpreting the requirements entities must publish under these amendments". This is unclear in practice as there are subtle differences between the two for several reporting fields, and there is no indication which guidance should be followed where conflicts arise.

Recommendation 7

Legislation for any proposed tax transparency fields should clearly identify which reporting guidance to follow.

3.3.2 Effective tax rates

The proposed effective tax rate is defined as that under Article 5.1 of the OECD's *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* (2021). This will be impossible to comply with as it is not yet law or been implemented anywhere in the world. At

[9] For example see here https://www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Corporate-tax-transparency-report-for-the-2020-21-income-year/

the same time, some reporting entities may not have to make effective tax rate calculations under Pillar Two (or may have jurisdictions that fall within safe harbours), meaning this unnecessarily increases compliance costs.

> Recommendation 8
> Do not require reporting of an effective tax rate, particularly one based on Pillar Two.

3.3.3 Ongoing uncertainty

The proposed changes provide a regulation-making power for governments to prescribe further reporting requirements over time without parliamentary approval. The draft Explanatory Memorandum argues this is "to ensure the requirements are kept up to date and aligned with the most recent international reporting standards". But the proposed reporting requirements are already *not* aligned with the most recent reporting standards.

It is also argued this approach will "provide taxpayers with certainty". Rather, this provides taxpayers with ongoing uncertainty around their reporting requirements and a limitless – and unconditional – expansion of reporting requirements. This uncertainty stems from both the regulation-making power and that existing requirements are not anchored around a coherent approach or common reporting standard. This is particularly the case given this goes well beyond the scope of the original policy announcement which committed to requiring country-by-country reporting for tax paid and the number of employees.[10]

> Recommendation 9
> Do not proceed with the regulation-making power that allows for increased reporting without parliamentary approval.

3.4 Inadequate impact analysis and consultation

3.4.1 Inadequate impact analysis

There is no evidence that the proposed changes have been put through a comprehensive policy development or assessment process that follows best practice principles. This includes clarity around how many companies are expected to be impacted by the proposal. The Office of Impact Analysis notes new policies should include:

- clearly identifying and defining the problem to be solved
- clearly identifying a legitimate reason for government action
- identifying a range of genuine policy options
- identifying the net benefits of each option
- explaining the purpose and objectives of consultation
- indicating the preferred option
- discussing what success looks like and how it will be achieved. [11]

Any proposed expansion of tax transparency reporting should consider the *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* legislated almost a decade ago, alongside other tax transparency measures. This includes how existing tax disclosures are used/prioritised, the impact of large volumes of information and how tax transparency affects decision making across all stakeholders. A recent comprehensive review of the research

[10] https://web.archive.org/web/20221004191508/https://www.alp.org.au/policies/labors-plan-to-ensure-multinationals-pay-their-fair-share-of-tax
[11] https://oia.pmc.gov.au/resources/guidance-impact-analysis/7-impact-analysis-questions

on corporate tax transparency finds "it remains uncertain whether the proposed benefits of disclosure actually materialise… So far, little is known about how investors actually utilise the disclosed information." [12]

3.4.2 Inadequate time for consultation

The consultation period for the proposed measure is unreasonably short given the proposal is due to commence in two months. The draft legislation is out for just 22 days of consultation, across a period that includes Easter and ANZAC Day public holidays. The BCA notes that the Best Practice Consultation Guidance Note issued by the Department of Prime Minister and Cabinet recommends a minimum consultation period of 30 days.[13] The Note also maintains that longer consultation periods may be necessary when they fall around holiday periods.

Inadequate consultation periods and impact analyses have been seen across a number of recent consultations, particularly those dealing with sensitive and complex proposals with high political salience. This is likely to produce sub-optimal policymaking, with increased risk of unintended consequences. The BCA continues to monitor Treasury's overall adherence to principles of best practice consultation.

Recommendation 10

Any proposed changes should be subject to a comprehensive assessment that follows best practice principles. This includes the problem to be solved must be well understood, new regulation is subject to cost-benefit analysis, adequate time for consultation, and regulation must achieve objectives at least cost.

[12] Müller, Raphael and Spengel, Christoph and Vay, Heiko, On the Determinants and Effects of Corporate Tax Transparency: Review of an Emerging Literature (October 2020). TRR 266 Accounting for Transparency Working Paper Series No. 43.
[13] Best Practice Consultation Guidance Note, Department of Prime Minister and Cabinet, March 2020. https://oia.pmc.gov.au/sites/default/files/2021-09/best-practice-consult.pdf

BUSINESS COUNCIL OF AUSTRALIA

42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 www.bca.com.au

BCA

Business Council of Australia