cta Corporate Tax Association

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Director
International Tax Branch
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By email: MNETaxTransparency@treasury.gov.au

Dear Sir/Madam,

Public Country-by-Country Reporting

The Corporate Tax Association (**CTA**) welcomes the opportunity to make a submission on the *Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Multinational tax transparency – Tax changes* Exposure Draft (**ED**) and accompanying Explanatory Materials (**EM**).

The CTA is the key representative body representing over 150 of the major companies in Australia on tax issues impacting the large corporate sector. The vast majority of the CTA membership are large Australian listed entities or US, UK, or EU-headquartered multinationals. A list of CTA members and further information about the CTA can be found on our website at www.corptax.com.au.

Background

The CTA is a strong and vocal advocate for public tax transparency that enlightens and does not misinform the public. Too often, the vast majority of large corporates are forced to defend their reputations from misinformed and unwarranted attacks.

Large corporates are increasingly frustrated at being painted as the cause of economic woes and somehow the magic tax pudding operating behind a wall of secrecy. We accept public tax transparency is important in public discourse but equally important is a discourse on where the real causes of our "tax gap" lie. This includes an honest fact-based appraisal of what policy changes are needed to bridge this gap. In short, we need transparent tax system changes, not jingoistic "fair share of tax" platitudes driving tax policy. This applies to all tax policy measures, including public tax transparency initiatives.

The facts are, in the Australian context, large businesses are amongst the most tax compliant, transparent and most heavily scrutinized group of taxpayers. The ATO's Findings Reports for the Top 100 and Top 1000 taxpayers show the vast majority comply with both the spirit and letter of the law. Where disputes arise, they tend to be interpretational - not tax avoidance or tax planning related.[1]

Context of the proposal within the current tax transparency environment

It is important to put the current proposal in context and how it seriously impinges on global initiatives, and frankly makes Australia appear out of touch with the world of multilateral tax transparency initiatives. From a transparency perspective, Australia is not coming from a zero base. This is not acknowledged in the ED or the EM. We have attached as an appendix a timeline that shows the level of public tax transparency (from both taxpayers and the ATO) and tax disclosures made to the ATO.

In the public tax transparency space, since 2014, certain tax data has been released to the public in a consolidated format for all SGEs (and others). There is also the voluntary tax transparency code.[2] The lesson to glean from both these transparency measures is, despite ATO and large corporates trying to explain what the numbers do and don't mean, the disclosures are often used by some commentators to confuse more than enlighten.[3] Whilst we accept this is not something that the government can control, what it can do is ensure that the information required to be published is meaningful, proportionate and purposeful.

Why Australia believes it knows better is concerning

As noted above, there is no mention in the EM of Australia's current transparency measures. The EM only notes in passing what the EU has mandated as a minimum standard on public tax transparency but doesn't articulate why Australia adopting the EU minimum standard or publishing current Country-by-Country (CbC) reports is not appropriate. The focus of the EM is more on effectively mandating optional (not legislated) GRI 207 standards.

The EM does not give any explanation as to why Australia believes it knows better than the EU on public tax transparency (or for that matter GRI 207-4) by seeking three additional pieces of information, without any real concern about the cost of complying or explaining why using existing established data sets isn't sufficient. This paints a picture of the EU Directive being wrong and of Australia working in a global vacuum and somehow knowing better while assuming the cost of complying with this unique Australian disclosure proposal is nominal. These features amount to a disturbing lack of awareness or disinterest in both existing domestic and international transparency developments.

We also understand that views on acceptance of general GRI ESG reporting by the ASX 100 have been extrapolated for the implicit acceptance of GRI 207-1 and 207-4 on tax disclosures as the basis for the assumption that this proposal should not be a burden, at least to Australian listed groups. We are aware the ASX 100 shows much lower adoption rates of GRI 207 tax reporting despite higher percentages of wider GRI standards. GRI 207 tax is mostly concentrated in the mining sector. We suspect the reason for limited GRI 207

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[1] See Findings report Top 100 income tax and GST programs | Australian Taxation Office (ato.gov.au) and Findings report – Top 1,000 income tax and GST assurance programs | Australian Taxation Office (ato.gov.au)

[2] See Report of entity tax information | Australian Taxation Office (ato.gov.au) and Voluntary Tax Transparency Code | Australian Taxation Office (ato.gov.au)

[3] For more detail on all current tax transparency disclosures see Tax-transparency-where-Australia-currently-stands-November-2022-FINAL.pdf (corptax.com.au)

pickup is many groups are already disclosing tax information under the voluntary tax transparency code.[4]

There is also no mention or suggestion in the EM that existing public transparency disclosures that cover the same ground will be repealed (at least for those subject to the proposal) or why it is considered they should remain in place if the Bill is passed. The effect of this oversight is a duplicative, incremental proposal that does not consolidate what is already in the public domain. In short, the proposal has the capacity to further confuse rather than enlighten while adding compliance cost to the ATO, taxpayers and ultimately the community.

Concerns have also been expressed to the CTA on the extra-territoriality of the measure and how it undermines EU public CbC transparency measures. The EU minimum standard was a finely tuned politically debated outcome, taking into account Action 13 CbC reporting limitations. Being a minimum standard, it allows businesses to voluntarily provide more information such as under GRI 207. The current proposal effectively mandates GRI 207 tax reporting even though an organisation may not yet have adopted the higher-level GRI reporting standards.

Compliance Costs Will Be Significant

Due to process implementation planning for Pillar Two in particular, impacted taxpayers are under significant resourcing pressure as they overhaul systems and processes to comply with Pillar Two and changing local tax laws due to emerging Qualifying Domestic Minimum Taxes in a number of jurisdictions in which they operate, on top of existing ATO requirements and other transparency measures including GRI.

Beyond 2024, the ever-increasing compliance burden cannot be understated and while we wholeheartedly support transparency, it is not reasonable to assume companies have the economic or human resources necessary to meet the ever-expanding scope of these and other similar measures.

Recommendation

In short, the current proposal does not get the balance right. Australia:

- should not be mandating disclosures beyond the EU public tax transparency standards; and
- should repeal the existing tax entity data disclosures (at least for those subject to the current transparency proposal).

This will ensure as best as possible a single source of data and remove unnecessary duplication. This still leaves the option for taxpayers to provide additional data points such as those under GRI 207-4.

The commencement date of any measure should also be no earlier than the income year commencing on or after 1 July 2023 (on this point, we note the EU public CBC measures are not due to commence until 30 June 2024).

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[4] The BCA have undertaken an analysis of level of GRI 207 reporting by the ASX 100, which we understand is incorporated in their submission on this measure.

Detailed Comments

If the government goes beyond EU minimum standards or the publication of existing CbC reports, we make the following specific observations on the proposed provisions in the ED. We note in all cases of data collection, no materiality thresholds are given. Consideration needs to be given to only requiring data on material countries, and like the EU possibly data on non-cooperative tax regimes.

Section 3D(3)

This section appears to give the Commissioner the discretion to allow an entity the ability to adopt a year end for reporting purposes that is different from 30 June. Whilst we understand the reporting entity may not file any forms currently in Australia (if they are for example a foreign country-by-country reporting entity), it is critical that groups have the ability to adopt their substituted accounting period (or financial reporting period) and not have this subject to a Commissioner discretion.

Section 3D(4)

This subsection requires the disclosure to be made within 12 months after the end of the "income year", whereas the OECD Pillar Two measures in Article 8.1.6 of the Model Rules require filing by 15 months after the last day of the "reporting fiscal year".

It would seem logical and appropriate that entities should not be reporting public data in Australia prior to completing and filing under the Pillar Two regime. The longer filing time allowed under the Pillar Two proposal was in response to extensive consultation which illustrated the longer timeframes allowed for local statutory and tax filings in different jurisdictions around the world.

Section 3D(6)(c) – revenue from unrelated parties

As currently drafted, "revenue from unrelated parties" is not defined and is different from the similar GRI 207-4 terminology which references "revenue from third party sales". Furthermore, OECD CbC reporting guidance uses the term "revenue" (but this excludes related party dividends).

It should be made clear which definition and explanatory material is to be used rather than the broad reference to achieving consistency with both GRI 207 and OECD CbC reporting standards as proposed in section 3D(7). We would recommend the specific use of OECD CbC reporting terminology for all items in section 3D(5) rather than 'Australianising' globally understood terminology.

Section 3D(6)(d) – revenue from related parties that are not tax residents of the jurisdiction.

Again, more specificity is needed on the term in this section and an explanation of why different terminology is used from that in either GRI 207 or OECD commentary. The terms unrelated and related parties, for example, are not defined and presumably, revenue from related non-residents in a jurisdiction (for branches) is excluded.

GRI 207-4 uses the phrase "[r]evenues from intra-group transactions with other tax jurisdictions" whereas OECD commentary refers to "the sum of revenues of all the

Constituent Entities of the MNE group in the relevant tax jurisdiction generated from transactions with associated enterprises."

Wording in the ED should adopt the OECD standard and not create a completely different phrase. This could be done as a specific reference to the OECD definition. This would ensure consistency with existing disclosures and systems of collecting the data.

Section 3D(6)(e) – expenses arising from transactions with related parties that are not tax residents of the jurisdiction.

This is one of the additional requirements over and above either GRI 207 or CbC reporting. As such, referencing GRI 207 and OECD CbC commentary is not helpful. We assume the thinking behind this inclusion is for SGEs to record expenses incurred with related parties from other jurisdictions. As currently defined, it would appear not to require disclosure of expenses with related parties that are non-residents but have a presence in a jurisdiction (such as branches).

This is information that current GRI or CbC systems do not capture or report. It therefore should not be assumed this is a simple exercise to extract from accounting systems. It will involve significant system changes to record and would require a non-resident foreign parent to track, purely to meet an Australian obligation where the Australian presence could be immaterial. Whilst we understand related party expenses can be informative of potential transfer pricing arrangements within a group, the reason why CbC reporting and GRI 207-4 do not require this information is of course one related party company's revenue is generally another related party company's expense.

We would recommend this requirement be removed.

Section 3D(6)(g) – a list of tangible and intangible assets as at the end of the income year.

This is a novel and incremental requirement with no indication given of how detailed such lists should be. Unlike GRI 207 and OECD CbC reporting, this requires a narrative and doesn't differentiate between acquired or developed intangibles or tangible assets or provide any level of materiality and is required country by country. To say this is not a simple exercise would be a gross understatement. We note that subsection (15) allows the Commissioner to exempt an entity from publishing data of a particular kind, but it is unclear if this potential exemption applies to the materiality of information. It also appears to be a "case by case" exemption that is unreviewable. Leaving it to the discretion of the Commissioner in an unreviewable format is entirely inappropriate. We note there is no draft guidance in the form of a draft Law Companion Ruling or Practical Compliance Guideline that taxpayers can refer to get a sense of what sort of things the ATO would consider. Saying this is something that the ATO may do in the future, without mandating more specific parameters, is very concerning.

We note the rationale in the EM at paragraph 1.19 references risks with related party intangibles. It notes "the presence of related party transactions and increases in intangible assets are specific indicators of corporate governance risk and would complement the GRI disclosures". We would appreciate a better explanation of why this is a governance risk given related party transactions are already subject to specific tax transfer pricing rules, CbC disclosures are made to tax authorities around the world, and groups have internal controls in place to manage such (presumably tax) risks and are of course subject to ATO scrutiny mostly as part of Justified Trust reviews. There is no context given as to why a list will provide stakeholders with any more insights into such risks. The proposal also has no levels of materiality which is a critical factor in determining risk, but more importantly whether the risk could manifest into a (presumably) tax issue.

We note subsection 3D(8) requires information to be based on the amounts shown in audited financial statements. There are of course cases where intangible assets in particular do not have a book value (such as non-acquired goodwill). In such cases, the "listing" of intangible assets does not appear to be required. This will of course distort the relevance of any disclosures.

Moreover, having a "list" in the public domain of all intangible and tangible assets (with no details of how detailed the description is needed) may well lead in some cases to commercially confidential information being in the public domain. This could include information the disclosure of which is not in the interest of national (and international) security. Carveouts for certain confidential information must form part of any disclosures similar to EU and GRI 207 carveouts over sensitive information, should this novel and unprecedented proposal be implemented. They should not rely on unreviewable decisions of the Commissioner under exemptions in subsections (13), (14) and (15).

The ATO (and other tax authorities) can always ask for this information as part of normal review processes if there is a perceived tax risk. In our view, a public list of assets adds nothing to public discourse on tax transparency or performance for the vast majority of groups. This information can be gleaned from statutory accounts for material asset classes. If for example a mining company listing it has a mine in Angola, mining equipment in Australia and a generator in France or a bank listing it has a banking application in every country, we find it hard to understand what public transparency value this is adding. Whilst we acknowledge the digitalisation of the global economy has led to challenges to the current global tax rules, these very issues are being managed via global solutions such as Pillars One and Two. Australia unilaterally requiring groups to do more is wholly inappropriate and we believe adds nothing to the transparency agenda but confusion and compliance cost.

We would recommend this subsection is removed or as a minimum, be limited to significantly material assets by high-level classification with appropriate, legislated carve-outs along EU and GRI 207 lines.

Section 3D(6)(k) – effective tax rate (and confusion on start dates) creates issues

We note this is an incremental requirement and uses the effective tax rate (ETR) defined by reference to the yet-to-be endorsed Model Pillar Two rules, which of course are not yet law nor implemented in any country in the world. We note the definition references particular articles in the Model Rules which appear to not take into account Pillar Two safe harbours, exclusions or wider design principles under the Model Rules. We are aware a similar proposal to publish Pillar Two ETR rates was rejected by the EU.

We note the ED indicates the disclosure requirement applies in relation to the 2023/2024 income and later years, whereas the EM notes at paragraph 1.38 the rules apply to obligations commencing on or after 1 July 2023.

If the ED dates are the intent rather than what is in the EM, this would mean early balancing groups (notably those with a 31 December 2023 year end in lieu of the year ended 30 June

2024) are already in scope and presumably need to plan and undertake the detailed Pillar Two ETR calculations. It should not be assumed this is a simple exercise, particularly as planning for the implementation of Pillar Two rules in many cases has yet to begin.

No impacted corporate we are aware of is anywhere near to being able to provide the ETR calculations as systems need to be developed for broader Pillar Two calculations which aren't expected to be effective until at least the years commencing on or after 1 January 2024 at the earliest. This is further complicated by the fact there is no "approved form" yet developed by the ATO that can be used commensurate with developing the systems to capture the data required.

Moreover, we question:

- what is the intent with the ETR disclosure;
- how does it interact with industries that are excluded from Pillar Two;
- how do the rules operate where safe harbours under Pillar Two rules apply; and
- what is the disclosure adding if the ETR for a subsidiary is less than say 15% but leads to top-up tax in the head company under the income inclusion rule.

The reality is, if confusion is the intent of any such disclosure, then the proposal meets that objective in spades. We also question in fact whether, under Pillar Two global rules, ETRs are to be disclosed to the public in any event.

Additionally given paragraphs (i), (j) and (l) in sec 3D(7)– which between them give a full picture of ETRs - a simple division of cash tax paid (i) to profit (f), or tax accrued (j) to profit (f) give various effective tax rates.

We would submit there is more than sufficient information on ETRs already available - bringing in an incremental Pillar Two ETR calculation which is a complicated and confusing number that only a handful of tax experts could possibly understand will only create confusion and opportunity for misunderstanding.

The ETR requirement should be removed or as a minimum delayed until there is Inclusive Framework (or at least OECD) agreement on the publication of the number.

Corrections

Whilst we understand the importance of any information being correct, it is inevitable that errors will occur. As currently proposed under subsection (11), a system would need to be established to track errors and report errors and for the Commissioner to take an active role to correct an error on the public website. This process would need to be global and could mean in theory a minor error in a tax return in one jurisdiction needs to be reported and reports amended.

Some level of materiality is required or a process to adjust data in future filings rather than constant monitoring for potential inconsequential errors.

Exemptions

Whilst we note the Commissioner may exclude specific entities or classes of entities or types of data under subsections (13), (14) and (15), there is no guidance given as to the type of entity, class of entity or type of information that can be excluded. As the rules are drafted, everything and everyone is included in the rules, unless determined by the Commissioner's unreviewable decision that they are not. Exclusions (such as those in the EU rules) should be made in the law, and not require granting obvious exemptions only if the Commissioner sees fit. There is no guidance such as a draft Law Companion Ruling or Practical Compliance Guideline indicating how the Commissioner will administer such rules.

For example, the draft law should:

- ensure CbC reporting entities that have no or minimal overseas activities, particularly if such activities and transactions in countries with high effective tax rates are excluded from the measure.

- allow groups that report under GRI 207 or the voluntary tax transparency code to provide a link to their current reporting rather than replicating it in a separate format.

Global Implications

As you are aware, the EU has mandated minimum public CbC reporting which varies dramatically from what is proposed in the ED and the OECD has not agreed to any form of public CbC reporting at this stage.

In particular, we note the EU Directive does not require disaggregated data on countries outside the EU except for certain "non-cooperative jurisdictions". Additionally, this information is not centralised on a globally accessible database. The EU rules were landed as a result of some highly contentious international political negotiations, taking into account concerns on extra-territoriality and constitutional issues such as those in France.

With the Australian proposal, many of the features of the EU proposal become effectively redundant as EU headquartered groups (and foreign groups with any EU operations) would have to disclose all individual country data for all countries under the ED. Whilst this is, of course, a matter for Australia and its sovereign rights, we should be extremely mindful of its potential impact on major trading partners. This is why the EU standard (or something very close to it) should be the legislative benchmark - without the three additional data points in the ED. Alternatively, the publication of OECD CbC reports should be used.

Taxpayers can then voluntarily adopt GRI 207 as and when they adopt the broader GRI principles of which GRI 207 is a part.

Commencement Date

The start date for disclosure by entities should be no earlier than for the income years commencing on or after 1 July 2023 and for those groups subject to EU public CbC Reporting, aligned with the timeframes of adoption of EU country public reporting requirements. This should be aligned with the financial year end of the parent entity home jurisdiction. Furthermore, seeking written approval from the Commissioner as contemplated by section 3D(3) is not required. It should simply mirror financial statutory reporting periods. The plausibility of companies being able to comply with an 'on or after 1 July 2023' start date is inextricably linked to the recommendations above being adopted.

Should you have any questions, please do not hesitate to contact Michelle de Niese on 0402 471 973 or Paul Suppree on 0408 185 050.

Yours sincerely,

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CC: Mr Marty Robinson, First Assistant Secretary, Corporate and International Division
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Appendix - Expected Tax Transparency Timeline

Expected 2024 Tax
Related Disclosures T