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Ref: AOC:np

28 April 2023

Director
International Tax Branch
Corporate and International Tax Division
The Treasury
Langton Cres
PARKES ACT 2600

By Email: *MNETaxTransparency@treasury.gov.au*

Dear Sir/Madam

PUBLIC COUNTRY-BY-COUNTRY REPORTING

1. Thank you for the opportunity to provide comments to Treasury in relation to the exposure draft legislation ("**ED**") and explanatory memorandum ("**EM**") relating to the proposed new tax transparency measures requiring certain entities to publish selected tax information for income years beginning on or after 1 July 2023.

2. Pitcher Partners specialises in advising Australian taxpayers in what is commonly referred to as the middle market. Pitcher Partners often deals with clients subject to existing Country-by-Country reporting requirements and therefore these clients are also potentially impacted by the proposed new public Country-by-Country ("**CbC**") reporting measures as described in the ED and EM.

3. In general, we believe that the proposed measure unjustifiably departs from the public CbC reporting standards of other jurisdictions, in particular those currently being implemented by the European Union ("**EU**"). Disclosure requirements should be agreed globally, with future reporting requirements updated for all jurisdictions at the same time. The additional information proposed by Treasury is likely to significantly increase the compliance burden for reporting entities and is disproportionate to the benefit likely

to be received by the Australian public. Additionally, we note that the start date proposed by Treasury fails to provide an appropriate transition time for entities to understand and comply with the proposed requirements.

4. We have provided below our commentary and recommendations as to how the proposed public CbC reporting measures can be adjusted with the aim of making the introduction of these reporting measures as seamless as possible for all parties concerned (being taxpayers, advisors and the Australian Taxation Office ("**ATO**") itself). Specifically, in summary our comments address the following areas:

   4.1. **Global consistency with existing public CbC reporting standards** - We recommend that Treasury consider adopting the already released EU Public Country-by-Country Reporting Directive (2021/2101) ("**EU Directive**") or similar to provide consistency of global reporting;

   4.2. **Additional information disclosures** – These disclosure requirements should be removed (and aligned to the EU Directive) striking an appropriate balance between transparency and administrative burden;

   4.3. **In scope entities** - We suggest an exemption be incorporated for small Australian subsidiaries of non-Australian headquartered CbC reporting parent entities based on certain threshold limits to minimise the compliance burden imposed;

   4.4. **Commencement of new public CbC reporting measures** - We recommend that the start date of the new rules is deferred by 12 months to provide taxpayers with adequate time to understand and implement the proposed measures;

   4.5. **Lodgement requirements** – We recommend that the disclosures are aligned to the EU Directive or CbC report (as per the OECD Action 13 guidance) are published upon taxpayer consent, thus minimising compliance costs for all parties involved; and

   4.6. **Penalties** – Lastly, we request that further clarity is provided with respect to penalties associated with non-compliance.

   Each of the items are discussed in further detail below.

Global consistency with existing public CbC reporting standards

5. We note that the public CbC reporting disclosures proposed by Treasury in its ED and EM go further than other public CbC reporting standards, in particular those being implemented by the EU as well as existing CbC reporting disclosures implemented in accordance with OECD BEPS Action 13. We have provided further commentary in this regard below.

6. The EU Directive came into force on 21 December 2021. EU member states have been given 18 months (i.e. until 22 June 2023) to transpose the Directive into their national laws. The requirements must apply, at the latest, from the commencement date of the first financial year starting on or after 22 June 2024. The disclosures required under the EU Directive are broadly[1] consistent with the OECD Action 13 – CbC reporting disclosures (i.e. minimal duplicative effort required).

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1 The EU Directive doesn't include certain items that required under the OECD Action 12 – CbC reporting disclosure namely, related and unrelated party revenue, stated capital and book value of tangible assets at the end of the income year.

7. The EU Directive's adoption of existing OECD BEPS Action 13 CbC reporting disclosures can be considered consistent with one of the key objectives of the OECD Base Erosion and Profit Shifting ("**BEPS**") program, being to introduce consistency of reporting standards globally for multinational enterprises. Consistency of financial disclosures is key for comparison purposes and to manage associated compliance burden imposed on enterprises[2].

8. We note that Australia as a member of the OECD and active participant in the BEPS program endorsed this view, as evidenced by its existing CbC Reporting requirements which are consistent with OECD Action 13 (particularly with respect to Annex III[3], the model template for the CbC report itself).

9. While we acknowledge that Treasury is committed to improving the quality and comparability of tax disclosures by large enterprises in Australia (by introducing standardised reporting requirements), we consider that it is imperative that reporting requirements proposed are consistent with other global standards.

10. It is in our view inherently inappropriate (given the BEPS ethos of globally consistent reporting) that the level of public disclosures in one jurisdiction be greater than that in another jurisdiction which would be the case if the proposed public CbC reporting measures are implemented as currently drafted.

11. Given that we understand this information will be disclosed electronically on the Australian Government website, and thus available globally on the internet, in essence, Australia would be providing additional information not only to its own residents but those of overseas jurisdictions, which under their local reporting requirements they are **not** entitled to and which under local tax secrecy laws would ordinarily result in the commission of criminal offences for any breaches.

12. In this regard, we recommend that Treasury consider adopting the already released EU Directive or something similar to provide consistency of global reporting as envisioned when first implementing the BEPS program and CbC reporting in Australia.

13. Whilst we note our recommendation above, for completeness we have provided further commentary on the nature of the additional proposed disclosures below.

Additional information disclosures

14. The ED broadly requires four further disclosures (over and above what is required to be confidentially disclosed under the existing non-public OECD CbC reporting as per the OECD Action 13), which includes:

    14.1. A list of tangible[4] and intangible assets held by the group in each jurisdiction, and book values of those assets;

    14.2. Expenses paid to related parties in other jurisdictions;

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2 Source: Inclusive Framework on BEPS - https://www.oecd.org/tax/beps/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf

3 Annex III of the Action 13: 2015 Final Report, Transfer Pricing Documentation and Country by Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project.

4 We note that the existing CbC reporting requirements do not require a list of tangible assets or their individual values to be provided but instead a figure is provided in aggregate for each jurisdiction. We further note, the definition used for existing CbC reporting requirements, references tangible assets other than cash and cash equivalents.

14.3. An explanation of why current year income tax accrued differs from the headline tax rate multiplied by profit before tax; and

14.4. The effective tax rates ("**ETR**") for each jurisdiction (with the ETR to be calculated consistently with how ETR will be calculated for Pillar Two purposes, which is a complex calculation and not in line with the ETR as calculated under Australia's Tax Transparency Code).

15. As detailed above, the EU Directive does not require this additional information. In addition, the EU Directive excludes information with respect to bifurcation of related and unrelated party revenue, and the book value for tangible assets at the end of the income year (which are required under the OECD's Action 13 CbC reporting). Requesting this information goes over and above what is required under the OECD's Action 13 CbC reporting, the EU Directive and against ensuring consistency with existing global standards.

16. The additional disclosure requirements listed above are likely to require extra internal resource allocations together with further material accounting system updates to ensure that the data required is accurately identified and disclosed thus materially increasing the compliance burden for those subject to a public CbC reporting regime.

17. On a related note, we acknowledge that some of the additional requirements proposed under the ED, which are not required under the OECD's Action 13 CbC reporting have been adopted in line with Global Reporting Initiatives ("**GRI**") 207[5]. Whilst some large multinational corporations have adopted this standard, it is a voluntary standard and should remain as such. Mandating these additional requirements goes beyond the requirements of other global standards on public CBC reporting.

18. Notwithstanding the above and the lack of consistency with existing CbC reporting requirements (both public and non-public), we have also provided comments on each of the additional disclosures listed above.

List of tangible and intangible assets held by the Group in each jurisdiction and book values of those assets

19. Reporting tangible and intangible assets by jurisdiction would require a significant amount of additional work and analysis by taxpayers as current CbC disclosures focus only on an aggregate value of tangible assets (other than cash and cash equivalents). This proposed disclosure would entail preparing detailed lists of tangible assets and their respective book values, significantly increasing the time and resource required to gather this information.

20. Further, the disclosure of information relating to the type, location and value of the Group's intangible assets from which it is often the case that much of the value of the Group's business is derived, could materially impact on the Group's commercial operations as it gives access to competitors, valuable insights as to the key value drivers of their business.

21. This outcome we consider to be contrary to the spirit and intent of the CbC reporting standard which is to provide high level data relating to a multinational group's financial performance and activities across the globe and not to infer or disadvantage on its

5 For example – approach to tax, reconciliation to annual report, an explanation of difference in income tax accrued and tax if statutory rate applied to profit before tax.

ability to operate competitively in the markets in which it operates, as a result of information provided by the Australian Government to the wider public.

Expenses paid to related parties in other jurisdictions

22. The additional disclosures for expenses paid to related parties by jurisdictions would require significant additional time and resource allocation to be dedicated to gathering this information particularly for multinational enterprises with a large number of trading entities engaged in intercompany transactions. At its simplest level, it can be considered a doubling up of the time and resource dedicated to identifying the flow of intercompany revenues within the multinational group.

Explanation of why current income tax accrued differs from the headline rate multiplied by profit before tax

23. The measure proposes to require entities to report on an explanation of why current income tax accrued differs from the headline rate. This imposes significant additional compliance burden as it requires a review of the adjustments made for tax purposes in determining tax payable in a given jurisdiction for a given income year for each entity within a particular jurisdiction.

24. Given each jurisdiction has its own rules and regulations as to what revenues are taxable and expenses deductible, the listing of these adjustments and the reasons why for each jurisdiction is a considerable undertaking (particularly where there are multiple entities in a jurisdiction who, depending on the nature of their business activities, may be subject to differing tax regimes within that particular tax jurisdiction) and we consider goes above and beyond the type of reporting that would be relevant to the Australian public who would be unlikely to understand such adjustments as they relate to overseas jurisdictions.

Effective tax rates for each jurisdiction

25. Given it is proposed that the ETRs be calculated in accordance with Pillar Two methodologies (we note there are currently four methodologies[6] under which the global minimum tax can be calculated which are inherently complex and yet to be formally prepared by taxpayers) it seems inordinately onerous to require taxpayers subject to Australia's public CbC reporting requirements to provide this information, the accuracy of which may be debatable given the lack of familiarity with the calculation methodologies under Pillar Two.

26. In summary therefore, we strongly recommend that these disclosure requirements be removed and rather than re-invent the wheel, Treasury should adopt the EU Directive. This proposal would strike an appropriate balance between transparency and administrative burden.

In scope entities (including exemption to specific entities)

27. We understand that all CbC reporting entities in Australia are captured within this regime.

28. However, in line with the EU Directive, we recommend an exemption be incorporated for small Australian subsidiaries of non-Australian headquartered CbC reporting parent entities based on certain threshold limits to minimise the compliance burden imposed.

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6 Income Inclusion Rule, Undertaxed Payment Rule, Subject To Tax Rule and Switch Over Rule

To maintain global consistency, the threshold could be set having regard to the EU Directive which excludes 'small undertaking' as defined by Directive 2013/34/EU.

29. The ED indicates that the Commissioner may exempt certain entities (where the entities have limited international dealings) from having to publish the selected tax information through a written notice. Further, a class of entities would also be exempted (for e.g. government entities) as they are subject to an alternate disclosure regime.

30. It is recommended that further guidance be provided with respect to thresholds for the limited international dealings and if other class of entities (for e.g. financial institutions) would be considered for exemption or alternate disclosure requirements prior to the ED being implemented.

31. Consideration could also be given to introducing a self-assessment mechanism whereby entities are responsible for notifying the ATO as to their eligibility or otherwise for public CbC reporting in Australia (similar to disclosures in Question 2 the International Dealings Schedule) in line with any thresholds defined by Treasury.

Commencement of new public CbC reporting measures

32. We understand from the EM that it is proposed that the public CbC reporting measures in Australia apply for income years beginning on or after 1 July 2023.

33. Given the ED and EM were only issued on 5 April 2023, this timeframe from provides insufficient time to educate and prepare for the introduction of this new, additional reporting regime given the additional disclosures that Treasury proposes to include.

34. If the disclosures in the proposed public CbC reporting regime were consistent with what is required under OECD Action 13 and Australia's current non-public CbC reporting regime as well as that of the EU's public CbC reporting regime, then given no additional analysis and information would need to be conducted and provided, this proposed timeframe would not be unreasonable as fulfilling the obligation would require simply a repetition of certain information provided currently.

35. We also note that EU member states were provided a longer timeframe to adopt the EU Directive into their national laws with commencement starting on or after 22 June 2024.

36. Taking account of the above, we recommend that the start date of the new rules is deferred by 12 months (i.e. applicable for income years beginning on or after 1 July 2024). This deferral would provide taxpayers a fair chance to consider the additional requirements and liaise with head office (where required) to inform them and ensure these additional requirements over and above the EU directive can be prepared in time, should they be adopted.

Lodgement requirements

37. We understand the taxpayer will fulfil its requirement to publish the selected information by providing the information in the 'approved form' to the Commissioner, with the Commissioner facilitating publication.

38. We note that the Commissioner is able to obtain the majority of the requested information from the CbC report lodged by the taxpayer or their CbC reporting parent in an overseas jurisdiction (through the automatic exchange of information).

39. In our view, we believe that compliance costs would be significantly reduced for taxpayers if the disclosures were aligned to the CbC report (as per the OECD Action 13

guidance) therefore, not requiring this information to be re-submitted in an approved form to the Commissioner.

40. Instead, we suggest that consideration be given to the publication of the following:

    40.1. Upon taxpayer consent, current non-public CbC reports by the ATO (as received direct from CbC reporting entities in Australia or as received from overseas tax authorities through the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports ("**CbC MCAA**")) effectively establishing a single CbC reporting regime in Australia minimising compliance costs for all parties involved; or

    40.2. Public CbC reports prepared in line with the EU Directive.

41. This would represent a positive affirmation of Treasury's intent as described in Paragraph 1.21. of the EM, which states that '*The combination of information required to be published is intended to provide the public with a comprehensive picture of the CBC reporting group's tax affairs while minimising the compliance and administrative burden imposed on the CBC reporting parent'.*

Penalty

42. The ED indicates that non-compliance of this regime will give rise to a penalty and refers to the existing general offence and penalty provisions in the Australian tax laws that could potentially be applied.

43. The penalty provisions in the Australian tax laws are complex[7] and the lack of clarity in the ED with respect to the application of the existing penalty provisions is likely to cause concern to many companies captured under this regime. This is critical given the proposed implementation date of 1 July 2023 and the additional reporting requirements over the existing information captured as part of the CbC report.

Summary

44. On a final note, we consider that the administrative burden of the proposed additional reporting requirements to Australian taxpayers is disproportionate to the benefit likely to be received by the Australia public and further results in an information asymmetry between what members of the public overseas are intended to have access to given their local public CbC requirements and what they will have access to given the availability of additional information on the Australian Government's website, if the public CbC regime as currently proposed is implemented in Australia.

45. Additional disclosure requirements should be agreed globally (as they were for OECD Action 13), with future CbC reporting requirements updated accordingly for all jurisdictions at the same time.

46. We therefore strongly recommend that the disclosures made to the Australian public be made consistent with existing EU Directive or that information already available to the ATO through current CbC reporting mechanisms be used, based on consensus with the taxpayer as the basis for public CbC reporting requirements minimising the burden of additional resource and compliance costs of all parties involved.

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7 Failure to lodge on time penalties – section 286-75 in Schedule 1 to the *Tax Administration Act 1953* ("**TAA**"), failure to comply with requirements under a taxation law – 8C and 8E of the TAA, etc.

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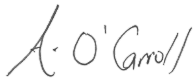
If you would like to discuss any aspect of this submission, please contact me on (03) 8612 9209.

Yours sincerely



A O'CARROLL
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