The Tax Institute

1 May 2023

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

By email: MNETaxTransparency@treasury.gov.au

Dear Director,

Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Multinational tax transparency - Tax changes

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Multinational tax transparency – Tax changes exposure draft legislation (**draft Bill**) and accompanying draft explanatory memorandum (**draft EM**).

In the development of this submission, we have closely consulted with our National Large Business and International Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

The Tax Institute has strong concerns about this measure. The draft Bill proposes to fundamentally change the public country-by-country (**CbC**) reporting requirements in Australia, introducing significant departures from the approach required by the Organisation for Economic Co-operation and Development (**OECD**) and widely accepted among member states. We consider that this will result in increased compliance burdens for impacted taxpayers, disproportionate adverse implications for the business community beyond tax, and risks broader ramifications for the Australian economy and our international relations.

Affected taxpayers, likely to be multinational enterprises (**MNEs**), are already subject to significant compliance costs and are facing additional pressures with significant regulatory changes on the horizon. The Tax Institute is of the view that any changes to the CbC reporting requirements should be consistent with the OECD's approach and should not result in Australia taking a position that is inconsistent with international best practice.

We also recommend that further consideration be given to the need to protect taxpayer confidentiality.

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The proposed measure places reporting entities in a position of commercial, financial or reputational risk if the published information is misused or mis-interpreted. Under the existing CbC regime, relevant information is already provided to the Australian Taxation Office (**ATO**) and shared with other tax authorities on a confidential basis. It is not readily apparent how publishing this information will address any gap in the Australian tax system.

Further, we have significant concerns about the proposal to publish information related to operations in jurisdictions other than Australia. This measure puts Australia in a position that is out of step with the global community on this issue. This may result in MNEs retracting their operations from Australia, which would be damaging for our economy in the short and long term. It also risks straining Australia's relationships with other countries that have chosen to operate a CbC reporting regime consistent with the OECD approach. We therefore strongly caution against publicly reporting this data.

The draft Bill would benefit from further supporting guidance on aspects such as how to report corrections and providing the information to the Commissioner. Without this guidance in a timely manner, it will be difficult for taxpayers to comply with their new obligations.

Finally, we consider that if this measure is to proceed, the start date for the measure should be delayed until 1 July 2024. This will ensure that taxpayers and tax practitioners have sufficient time to understand the implications of the changes on their circumstances. It will also allow time for the ATO to provide the guidance needed to allow taxpayers to practically comply with their new obligations.

Our detailed response is contained in **Appendix A**.

The Tax Institute is committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact our Senior Tax Counsel, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,

Scott Treatt
General Manager,
Tax Policy and Advocacy

Jerome Tse
Council Member

APPENDIX A

We have set out below our detailed comments and observations for your consideration.

Objective of comparability

The objective of allowing the public to compare the tax information of MNEs is fraught. There are various reasons why an MNE's tax profile may differ to another including the industry in which it operates and other commercial reasons including its structure, scale and funding matrix, and importantly, the tax system of the jurisdiction in which it operates. Opening the doors to public scrutiny of the tax information of MNEs without adequate investment in public tax education so that the community is better aware of the complexity of the tax system (both in Australia and internationally), and the countless nuances that can lead to different tax outcomes, will only exacerbate existing biases and fuel misinformation.

Publishing taxpayer information

The current CbC reports are confidential, being subject to exchange with other jurisdictions pursuant to information sharing arrangements. The existing reporting regime is consistent with Australia's international obligations under OECD's G20 Base Erosion and Profit Shifting Project report on Action 13 (**Action 13**).

Confidentiality of the information collected is a fundamental aspect of Action 13, with non-compliance potentially impacting information sharing arrangements and relations between nations.[1] However, the draft Bill proposes to publish the information gathered under the new CbC reporting regime. Paragraphs 1.27 and 1.28 of the draft EM state that the information proposed to be collected by the new reporting regime overlaps with the information reported under the existing confidential regime. In effect, the proposed measure will bypass Australia's international obligations under Action 13.

We do not consider this to be an appropriate outcome for impacted taxpayers or indeed Australia's position in the global community. The release of this information can have a seriously detrimental impact on competitive markets around the world, as recognised by the OECD in the decision to treat CbC reports confidentially. There is a significant risk that the information could be misused to gain an unfair competitive advantage. Depending on the level of disclosure required, there may be a further risk that some taxpayers will be compelled to provide information about projects or assets that should otherwise not be made known to the public. Examples include defence contracts that could impact national security.

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[1] OECD's G20 Base Erosion and Profit Shifting Project report on Action 13, page 37, available at https://www.oecd.org/ctp/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf.

Published information is also at risk of being misinterpreted which can have seriously adverse implications on businesses and the broader economy. CbC reports are not intended to be read as standalone documents. They must be read in conjunction with other reports, such as transfer pricing files including the Master File and Local Files, in order to provide a complete picture of the company's tax profile and performance. There is a significant risk that releasing the information publicly could result in reputational damage, financial losses, or other negative consequences for businesses where the public draws incorrect inferences from part of the picture. We have seen many real examples of this in recent history, particularly through mainstream media and the influence of certain stakeholders in society. This will not promote the stated objective of allowing an accurate understanding for investors or the public to better assess whether an entity's economic presence in a jurisdiction aligns with the amount of tax they pay in that jurisdiction.[2]

Accordingly, we consider that the information collected as part of the CbC reporting should not be made publicly available. The CbC reporting regime should continue to protect taxpayer confidentiality.

Departure from OECD approach and international best practice

The proposed measure not only requires affected taxpayers to publish tax information about their Australian presence, it imposes an obligation to publish information on their global operations. While some jurisdictions, including European countries, require taxpayers to publish tax information about their affairs in those particular jurisdictions, it is completely out of step for Australia to require publication of the tax information of MNEs in jurisdictions other than Australia. Many countries place significant importance on the confidentiality of taxpayer information. This measure effectively allows Australia to overrule those countries and publish information relating to operations therein, merely because the relevant MNE has a connection to Australia. This puts Australia in an isolated position in the international community and may strain relations with those countries that remain committed to the OECD's approach.

If the Government pursues the requirement to publish information contained in the CbC report, we consider it important for the reporting requirements to align with the CbC reporting standards set by the OECD. Compliance with CbC reporting as outlined by the OECD has required MNEs to invest intensive resources including time, people and costs. Introducing new requirements, outside of those published by the OECD, will necessitate the dedication of significant resources at a time when MNEs are already grappling with new impending global guidance and legislative changes, including the adoption of Pillar 2. Additionally, asking for new or different information will result in multiple versions of the CbC report being required which may lead to further misinterpretation and errors, as noted above.

We therefore recommend that the Australian approach align with the OECD in all aspects of information required to be furnished in the CbC report. The following provisions in the draft Bill depart from the OECD's recommendations and should be amended to ensure consistency:

- paragraph 3D(5)(b) requires a description of the reporting group's 'approach to tax';

[2] Draft EM, paragraph 1.1.

- paragraph 3D(5)(d) and 3D(7)(e) provide for potential further disclosures under regulations that may be made. Such regulations could depart from the OECD's approach and any requirements under such regulations should have a deferred start date to enable MNEs to implement changes necessary in time;
- the definitions used in subsection 3D(6) should be aligned to those used in the OECD's Guidelines;
- paragraph 3D6(e) requires disclosure of the expenses arising from transactions with related parties that are not tax residents of the jurisdiction;[3]
- paragraph 3D6(h) requires the inclusion of a list (including the value of) intangible assets at the end of the income year;[4]
- paragraph 3D6(k) requires disclosure of the effective tax rates by jurisdiction;[5] and
- paragraph 3D(6)(l) requires the reporting entity to explain the difference between the income tax accrued and the amount of income tax due if the income tax rate applicable in the jurisdiction were applied to the profit/loss before income tax.

The draft EM recognises that some of these requirements are a departure from the OECD approach. The rationale provided is that these requirements have been included to 'enhance the CbC disclosures' and 'complement GRI 207 disclosures'. No further information has been provided as to how this may improve disclosure. In the case of the list of 'intangible assets', we have serious concerns about the potential resource intensive exercise of collating this information and valuing such assets, particularly since no guidance has been provided as to what is proposed to be included in the meaning of 'intangible assets'.

It is not clear how the additional reporting requirements, particularly of the magnitude proposed, are expected to minimise the compliance and administrative burden imposed on affected taxpayers, as suggested at paragraph 1.21 of the draft EM.

In relation to paragraph 3D(6)(k), if this is to proceed, it may be possible to limit the compliance burden of this additional requirement by reference to existing reporting requirements. That is, the calculation in paragraph 3D(6)(k) should be able to be confirmed by reference to paragraphs 3D(6)(i), (j) and (f) using the following formula:

> Effective tax rate = (income tax paid + income tax accrued) / profit or loss before income tax

Availability of information

Subsection 3D(8) of the draft Bill states that:

> 'The information published by the entity under subsection (5) must be based on amounts as shown in the audited consolidated financial statements for the entity for the period that corresponds to the income year.'

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[3] Paragraph 1.19 of the draft EM acknowledges that this is a departure from the OECD's requirements in Global Reporting Initiative's Sustainability Reporting Standards GRI 207:Tax (2019).

[4] Ibid.

[5] Ibid.

Feedback from our members indicates that a large amount of the information outlined in subsection 3D(5) of the draft Bill is not available in audited consolidated financial statements. For example, most audited consolidated financial statements eliminate intercompany transactions. Compliance with this provision would require affected taxpayers to introduce new processes and systems and in some cases may require manual input (for example, to reconcile tax attributes across legal entities within a jurisdiction, and reconcile them across different tax system, generally accepted accounting principles (**GAAP**), currency differences and other variables). Realistically, this cannot be achieved in the timeframe proposed by the Government. The Tax Institute is of the view that this should be amended so the information sought is available in existing reporting standards. Doing so will reduce the compliance costs for impacted taxpayers.

Information provided to the Commissioner

We consider that further guidance from the ATO is required on how information is to be provided to the Commissioner pursuant to subsection 3D(9) of the draft Bill. There needs to be clarity in relation to the format for the requested information and any related filings that will be required (e.g. unique identification numbers for which an entity may need to register for the proposed Government operated database). These requirements will be of particular concern for foreign based MNEs that are required to provide reports under the proposed standards. Without guidance in this regard, it will not be practically possible for taxpayers to comply with their reporting obligations.

Correcting errors

Subsection 3D(11) of the draft Bill require the reporting entity to notify the Commissioner of any errors in their CbC reports as soon as possible. We consider that further detailed guidance is required on what constitutes an error, and when the Commissioner must be notified. For example, it is currently uncertain whether changes to the financial statements following an audit requires notification of a correction.

We also consider that the Government should introduce a materiality threshold. Although it is important for any reporting to be accurate, the reporting obligations need to be balanced with the compliance burden imposed on taxpayers. Correction of immaterial amounts should not be required to be reported to the Commissioner.

Commencement date

If this measure is to proceed, we consider that the commencement date should be delayed to 1 July 2024. The proposed measure introduces significant changes to the reporting requirements for impacted taxpayers. There are only approximately 2 months before the proposed start date of 1 July 2023. As outlined above, there are a number of aspects of the measure which require refinement. Further supporting guidance material from the ATO is necessary to ensure that taxpayers understand the extent of the measure and how to practically comply. This will require an investment of time and resources by the Treasury, the ATO, and taxpayers. Given these challenges and constraints, it is unlikely that this will be achievable by 1 July 2023.

The Tax Institute considers that as a matter of good tax law and policy, it is beneficial for the system as a whole to ensure the law and guidance is sound and robust, and taxpayers are provided reasonable time to get across the new measure before it is implemented. This approach is to be preferred over a rushed process to pass and implement the measure which will undoubtedly require tweaks and amendments in the future and give rise to an undue compliance burden on affected taxpayers.