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Dear Sir/Madam

### **Exposure draft law: Multinational Tax Transparency Reporting – Public Country By Country Reporting**

We welcome the opportunity to make a submission in relation to the Multinational Entity (MNE) Tax Transparency Exposure Draft (the **Exposure Draft**) released on 6 April 2023 requiring the public release of certain information on a country by country (CBC) basis by CBC reporting entities (**Public CBC Reporting Entities**).

### **Background**

The Exposure Draft requires Public CBC Reporting Entities to provide to the Commissioner tax related CBC information in a standalone report (**Public CBC Report**) for subsequent publication by Government. The Public CBC Report requirements draw from those required under the OECD Action 13 Country by Country Report (**OECD CBC Report**), the EU Directive 2021/2101<sup>1</sup> (**EU Directive**) and the voluntary Global Reporting Initiative (GRI) Disclosures 207-1 and 207-4 of GRI 207:Tax (2019) of the GRI's Sustainability Reporting Standards (collectively the **GRI 207 standards**). There are further disclosure requirements which are unique to Australia. Significantly, the disclosure requirements are on jurisdiction by jurisdiction basis.

If legislated, these measures would be the first unrestricted world-wide mandated public reporting of all CBC data and would apply to any large MNE<sup>2</sup> doing business in Australia, regardless of whether its group parent is an Australian or foreign entity.

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<sup>1</sup> DIRECTIVE (EU) 2021/2101 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2021:429:FULL&from=EN>

<sup>2</sup> Subject to the company meeting the CBC reporting parent definition which requires a group revenue in excess of \$A1 billion.

## Summary

PwC is a strong supporter of meaningful transparency in our taxation system and supports the introduction of measures that aim to enhance trust in the tax system and maintain the integrity of Australia's tax base. We understand the Australian Government's commitment to deliver tax transparency and are fully supportive of this if it is done within the remit of an internationally agreed framework.

However, based on our own observations and discussions with stakeholders, domestically and internationally, there has been significant concern with these measures as currently drafted. In summary, in our view, the design of the proposed legislation may not meet policy objectives of enhancing transparency and trust without an excessively onerous compliance burden. The key issues are as follows:

- The commencement date of the proposed measure will make it difficult for Public CBC Reporting Entities to comply, particularly given the need for necessary infrastructure (e.g., systems, guidance) to be developed, tested and implemented;
- The scope of the disclosures are significant, unique in cases, and go well beyond any currently mandated public CBC reporting regimes globally. We also note that there has been limited take up of the full suite of GRI standards relating to tax that are referred to in the commentary and therefore the bridge to comply is much more significant than envisaged in the Explanatory Memorandum;
- The timing and disclosure definitions are inconsistent with other global reporting regimes, being at odds with OECD efforts to obtain global alignment on setting consistent standards which mean that companies may soon be faced with multiple public reporting regimes with increasingly localised requirements. This will also create confusion and potentially undermine the policy objective of transparency;
- There are significant concerns relating to confidential and legally prohibited information being published; and
- The proposed measures place a considerable compliance burden on MNEs and the additional compliance cost may significantly outweigh the incremental benefits of the additional disclosures.

These issues highlight the need for thorough consultation prior to a draft Bill being introduced into Parliament and to allow sufficient time for stakeholder feedback to be considered. Our key recommendations are set out below.

All references in this submission are to the *Income Tax Assessment Act 1997*, unless specified. References to the ITAA 1936 are to the *Income Tax Assessment Act 1936*.

## Our key recommendations

1. Deferral of the commencement of these measures until, at the earliest, income years starting on or after 1 July 2025 or, where disclosures go beyond existing public reporting regimes, income years starting on or after 1 July 2026 to allow for appropriate consultation, clarification guidance and systems to be developed with stakeholders. A deferred commencement should seek to avoid triggering conflict with the timing of EU Directive legislation introduced by EU member states.
2. Inclusion of materiality thresholds into the proposed legislation to ensure Public CBC Reporting Entities with Australian activities (existing and prospective) below a particular threshold are not disproportionately burdened, along the lines of the EU Directive.
3. Ensure the necessary protections relating to confidential, commercially sensitive and legally prohibited information are appropriately included to avoid mandating the publication of seriously prejudicial information in Australia.
4. Align the jurisdictional scope of the disclosures with the EU Directive such that information of each jurisdiction be provided for Australia and other in scope countries. In scope countries may include non-cooperative jurisdictions and those countries that have not fully complied with international reporting standards. Disclosure for all other countries would be aggregated.
5. In relation to the unique Australian disclosures, these measures are excluded (or further deferred to commence at least until on or after 1 July 2026) to allow further consultation with domestic and international stakeholders.
6. Rectify the definitional inconsistencies within the Exposure Draft and Explanatory Memorandum. This can be most easily addressed by permitting any of the relevant definitions under the different reporting regimes and standards accompanied with appropriate disclosure of the standard applied.
7. Provide further clarification on a number of administrative areas including the application and practical administration of penalties for foreign Public CBC Reporting Entities and the Commissioner's powers, such as granting deferrals.

We have set out in this submission our respectful recommendations to address the issues raised in more detail in the attached appendices as follows:

Appendix 1 - Alignment with other global reporting regimes

Appendix 2 - the unique Australian Public CBC disclosures (the **Additional Disclosures**)

Appendix 3 - Specific issues arising from the Exposure Draft

Appendix 4 - Further administrative guidance required and implementation considerations

Appendix 5 - Summary of recommendations



While this submission is made by PwC Australia, we have consulted with colleagues in other PwC member firms across the world, both to call upon their expertise in relation to other public CBC reporting regimes and standards, and to ascertain the views of their non-Australian headquartered companies on the Exposure Draft. This submission reflects input on both of those aspects.

We welcome the opportunity to discuss our submission with you and to engage in further consultation as the specific measures are designed and refined. If you have any questions or wish to make arrangements for a meeting, please contact Nick Houseman, Chris Vanderkley or Sarah Saville.

Yours sincerely

A handwritten signature in blue ink that reads "CMorris".

Chris Morris  
Australian Tax Leader

## Appendix 1 - Alignment with other global reporting regimes

It is recognised that there has been a shift in global approaches towards the transparency of tax data on a CBC basis. PwC is a strong supporter of meaningful transparency in our taxation system and encourages that reporting requirements should be consistent with existing transparency reporting systems to avoid imposing undue administrative burdens on taxpayers.

The EU Directive on mandatory public CBC reporting was developed and passed in 2021 following a number of years of necessary consultation and negotiation amongst member states. This framework is to be legislated by member states with likely timing for most reporting entities to be 2025 for reporting in 2026.

GRI 207 standards have been developed for the purpose of achieving a consistency across companies in their voluntary public reporting of CBC tax information. These leverage and build on the OECD CBC Reporting regime but with some differences given the public nature of the disclosures. To date some companies have adopted these standards and do report publicly under GRI 207, however it is by no means widely adopted at this point in time.

The Exposure Draft goes beyond comparable regimes elsewhere in the world and in many respects is not consistent in either timing of implementation, scope of requirements and definitions adopted by those other regimes. This will lead to different information being publicly reported under different regimes and risks undermining the confidence in public transparency. We submit that it is important for a range of reasons to aim for consistency in reporting regimes. Below is a summary of some of the key differences and our recommendations.

**Table 1 - Summary of Appendix 1 recommendations**

Issue	Exposure Draft	EU Directive	GRI 207	Recommendation
Timing of commencement	2023-2024 income years	Typically mid 2025 with reporting in 2026	Optional. Once reporting entities have developed the necessary reporting capabilities	No earlier than income years starting on or after 1 July 2025
Confidentiality protections	None	Yes	Yes	Include confidentiality protections aligned with the EU Directive and GRI 207
Materiality	None	Yes	Yes	Include materiality

threshold				thresholds aligned with the EU Directive
Jurisdictional requirements	Jurisdiction by jurisdiction	Aggregation for non-EU-member states	Optional. Disaggregate if voluntarily disclosed	Disaggregated for Australian and in scope jurisdictions. All other entities aggregated

### Deferral of measures to commence from no earlier than 1 July 2025

There is a need for comprehensive guidance on process, definitions and administrative issues much of which will not be available until after the reporting period has commenced.

Other mandatory global reporting regimes, which serve as a best-practice guide, have allowed significantly longer preparation time. For example, in implementing the EU Directive (which came into force in December 2021), most EU member states will enact legislation impacting reporting entities from financial years starting on or after June 22, 2024<sup>3</sup>. This allows a 4 to 5 year implementation timeline.

Even if we take the earliest adopter of the EU Directive, Romania, which transposed the EU Directive into domestic legislation effective to income years starting on or after 1 January 2023, that is over a year from when the EU Directive was agreed. Following the same fast tracked timeline, taxpayers would have one year after the draft bill is passed, meaning the commencement date would be income years on or after 1 July 2024 (noting of course that the majority of EU member states will likely not transpose legislation until mid 2023).

Further, while the proposed legislation predominantly relies on the voluntary GRI 207 standard as the basis for the disclosures<sup>4</sup>, there has been limited take up of the full suite of these measures with reporting entities typically only partially adopting certain GRI 207 standards. As a result, under the proposed rules, most taxpayers will have to leapfrog from OECD CBC Reporting requirements to GRI 207 standards to meet the Australian Public CBC Report requirements. Many taxpayers will not currently have this ability, an issue which is compounded by the uncertainties and inconsistencies in the proposed legislation.

<sup>3</sup> For example, the EU Directive came into force in December 2021 and allows EU Member States 18 months to transpose the EU Directive into domestic legislation (some member states may opt for early adoption). As a result, EU Member States have until June 22, 2023 to transpose the Directive into domestic legislation. The rules will apply, at the latest, from the commencement date of the first financial year starting on or after June 22, 2024. On this basis, the EU Directive disclosures will first typically be required in the latter part of 2025 (or, more likely, 2026 for those with a 31 December accounting year end).

<sup>4</sup> Explanatory Material, paragraph 1.19.

**Recommendation:** A sufficient deferral to allow for an adequate implementation window is required. We therefore submit that the commencement date is amended to apply to no earlier than income years starting on or after 1 July 2025.

To the extent the commencement date remains unchanged, then we would submit that the level of disclosures required should be consistent with that set out in the EU Directive (and the other recommendation set out in Appendix 1) until appropriate consultation can be undertaken with stakeholders.

*Staggered deferral of implementation based on size*

If there is no change to the proposed commencement date for the consultation process, then another option to proportionately allow more taxpayers more time to prepare the disclosures is to adopt a staggered introduction of these measures based on:

- a. Well established materiality thresholds that are already contained in Australian legislation or in tax filing requirements enforced by the Commissioner; and
- b. A level of disclosure based on prescribed thresholds, an approach which is more consistent with the approach undertaken in the EU Directive.

**Confidentiality constraints and specific legal prohibitions**

The policy objective of public CBC reporting, as explained in the “Government election commitments: Multinational tax integrity and enhanced tax transparency - Consultation Paper (August 2022)” (**Treasury Consultation Paper**), is to improve community awareness around the arrangements of large MNEs operating within Australia by highlighting the amount of tax these entities pay<sup>5</sup> while noting that one of the challenges of shifting to greater tax transparency is to limit unintended consequences<sup>6</sup>.

The proposed legislation may result in unintended consequences relating to the publication of commercially sensitive information. In certain cases, publication of this information may be seriously prejudicial to an entity’s commercial position. Some examples include:

- a. information relating to geographical location of tangible and intangible assets of a defense contractor for the US Government which may have national security implications;
- b. the location of data centres owned by large technology companies which are often not publicly disclosed for security reasons; and

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<sup>5</sup> Treasury Consultation Paper, page 21.

<sup>6</sup> Ibid, page 26.

- c. many construction groups may have jurisdictions in which they undertake a single project; the proposed legislation would effectively require full disclosure of project profitability which may be commercially sensitive.

In addition to these consequential issues, scenarios may arise where the disclosure of sensitive commercial information that would be considered confidential by other jurisdictions (or 'seriously prejudicial' in the context of the EU Directive disclosures) would be mandated to be disclosed publicly in Australia. These requirements therefore would potentially undermine those other regimes (including the EU Directive and GRI 207). There would also be a significant contagion risk as other jurisdictions may implement similar rules resulting in a series of localised CBC reporting regimes required across multiple jurisdictions. These regimes may be wider reaching (e.g., adopting additional disclosures requiring greater access to commercially sensitive Australian information).

Therefore, it is important that a mechanism would be incorporated into the proposed legislation to address these concerns. This mechanism could align with other reporting regimes (such as the EU Directive and GRI 207 standards) which have incorporated such flexibility<sup>78</sup> to prevent public reporting of information subject to confidentiality constraints or legal prohibitions.

We note that there are a combination of potential exemptions for entities or information under proposed Section 3D(14) and 3D(15). These exemptions require notice in writing from the Commissioner. There is no indication in the Exposure Draft as to the intended breadth of these exemptions or the range of circumstances under which they might be given. However, to the extent that it is contemplated that any exemptions on the grounds of commercial confidentiality or legal prohibition are considered to be addressed by this provision; we would submit that this is not the appropriate mechanism for addressing this issue. It is not practical for the Commissioner to be required to consider individual requests for confidentiality and further it is not appropriate for the Commissioner to have the discretion to consider and evaluate whether a confidentiality request is appropriate for exemption in the context of a public disclosure.

We note that this is distinct and separate from any requirement that a taxpayer may have under Australia's taxation laws to provide the same information to the Commissioner for purposes other than public disclosure.

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<sup>7</sup> The EU Directive allows the ability for entities to defer disclosing certain information provided they clearly disclose the deferral along with a reasoned explanation in the report. The Directive provides that Member States may allow that any information thus omitted shall be made public in a later report no more than five years from the date of its original omission. Information pertaining to the EU's blacklist and the relevant EU grey list countries will not be subject to this deferral mechanism.

<sup>8</sup> The GRI 207 also permits exclusion of confidential information in exceptional cases with the appropriate reasoning disclosed (in accordance with GRI 101: Foundation 2016). Such reasoning includes confidentiality constraints, specific legal prohibitions, unavailability of information or the disclosure requirement not being applicable..



**Recommendation:** We submit that the Exposure Draft includes a mechanism which, similar to the GRI 207-4 standard, allows the reporting entity the ability to omit confidential and legally prohibited information which is accompanied with a supporting disclosure outlining the relevant reasoning based on a prescribed and agreed standard. As part of this mechanism, we recommend that stakeholder input is sought to develop the relevant omission standards.

If the process is to involve a formal exemption process, this should be developed via consultation with stakeholders globally, and the appropriate guidance as to how such a process would work be developed. This guidance would also need to explain the evidence required to substantiate the omission of information (without surrendering the confidential or legally prohibited information during the process). This option however would be administratively cumbersome for reporting entities, the Commissioner and would be difficult to apply in practice without significant resources employed.

#### **Exclude CBC Reporting Parents with small Australian subsidiaries or permanent establishments**

One of the policy objectives of these measures, as set out in the Treasury Consultation Paper, is to consider the balance of the need for greater transparency without imposing unnecessary compliance costs. Currently the Exposure Draft does not consider the extent of the compliance costs associated with complying with the Public CBC Report relative to the level of activity undertaken in Australia. As a result, the burden of disclosure requirement gives rise to disproportionate consequences for CBC Reporting Parents that have small Australian operations.

For example, a CBC Reporting Parent may have a small Australian operation (e.g., with a single employee generating limited revenue) and, as a result of the Exposure Draft requirements, the CBC Reporting Parent will have an obligation under the Exposure Draft to public CBC reporting in Australia. This may also adversely impact broader commercial decisions relating to the Australian market where such compliance burdens are material relative to the level of significance of the Australian activities (or further activities).

Equally important, any existing multinational that is considering commencing setting up business in Australia through a small initial presence will be subject to a disproportionate reporting requirement relative to the size and scale of its Australian operations. This will inevitably defer or deter foreign investors that are not already within the Australian taxpayer base.

We note this issue of proportionality was addressed in the EU Directive. A group parent with at least €750m consolidated revenues generally would be within the scope if it has at least one large or medium-sized EU entity. The definition of large or medium-sized entity is in

accordance with Article 3 of the Accounting Directive<sup>9</sup> being a company that meets two of the following three conditions:

- a balance sheet greater than €4m;
- net turnover greater than €8m; or
- an average number of employees exceeding 50.

**Recommendation:** We submit that similar threshold requirements are incorporated into the Exposure Draft so as not to disproportionately disadvantage CBC Reporting Parents with limited or small Australian activities or adversely impact decisions of foreign MNE's entering into the Australian market. We recommend that these thresholds are aligned to those in the EU Directive.

We also submit that a similar threshold requirement is applied to Australian tax resident CBC Reporting Entities such that overseas members of the CBC reporting group that fall below the specified threshold requirement will fall outside the scope of the Public CBC Report until those thresholds are exceeded.

### **Aggregation of non-Australian country data**

The EU Directive represents the closest comparative to the Public CBC Report as a mandatory reporting regime. After first being tabled in 2016, multilateral input and consultation with EU member states was obtained to reach a balanced set of disclosure requirements that were agreed to by the majority of MEPs on 11 November 2021. To date, a number of EU member state legislators have since transposed into domestic legislation the content of the EU Directive.

A key feature of the EU Directive is the distinction between disaggregated disclosure requirements for certain jurisdictions (largely those which have obtained input and consensus from the affected states) and aggregated disclosure requirements for other jurisdictions (those jurisdictions which have not had the ability to input or vote on the measures). More specifically, the EU Directive requires taxpayers publicly disclose the corporate income tax they pay in each EU Member State plus in each of the countries that are either on the EU list of non-cooperative jurisdictions for tax purposes (the 'EU's blacklist'), or listed for two consecutive years on the list of jurisdictions that do not yet comply with all international tax standards but have committed to reform (the 'EU's grey list'). Importantly, information relating to other 'third' countries is aggregated<sup>10</sup>.

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<sup>9</sup> DIRECTIVE 2013/34/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, ARTICLE 3.

<sup>10</sup> The Commission is tasked, within the framework of the Review Clause (Article 48h), to consider whether full disaggregation for non-EU and non-blacklist / grey list countries would enhance the effectiveness of this Directive. This process will take into account the situation at the OECD level, the need to ensure that there is a sufficient level of transparency and the need to preserve and ensure a competitive environment for undertakings and private investment

**Recommendation:** We submit that the jurisdictional basis upon which the Public CBC Reporting requirements be broadly aligned to the EU Directive. This approach would involve publishing disaggregated information on an audited consolidated basis for:

- Australian tax resident entities and permanent establishments; and
- additional 'in scope' countries, which could include;
  - Non-cooperative jurisdictions on the EU's blacklist; and
  - Jurisdictions that do not yet comply with all international tax standards but have committed which are contained on EU's grey list; and
  - EU member jurisdictions to the extent that they are required to report under the EU Directive.

Jurisdictions that do not meet these requirements would be aggregated on a consistent basis with the EU Directive approach. The financial information would be aggregated on an audited consolidated financial statement basis.

### **Misinterpretation of information may undermine transparency and trust in the tax system**

We support the policy objective of meaningful transparency in our taxation system that will build trust and maintain the integrity of Australia's tax base. As part of the public debate, information may be misinterpreted which may undermine the policy goals of meaningful and well informed transparency.

This risk is more prevalent where disclosures are mandated without the necessary context. For example, information relating to a MNEs value chain is critical in tax administrations understanding transfer pricing risk associated with a group's international related party dealings. The contextual importance of the group's value chain necessitated that the OECD CBC Report be accompanied with a Master File<sup>11</sup> report which explains the groups value chain, operations and transfer pricing models.

To put it another way, tax administrations themselves are unable to rely solely on OECD CBC Report disclosure to make informed decisions about risk. Context is needed and, in all cases, required.

On a related point, and as demonstrated in Appendix 4, the meaning and definitions that sit behind the disclosures are complex and vary depending on the reporting standards adopted by different reporting regimes. This may make it difficult for all consumers (including the Commissioner and tax authorities in other jurisdictions) to interpret, draw comparisons and risk undermining policy objectives of improving transparency.

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<sup>11</sup> OECD Action 13 / G20 base erosion and profit shifting project.



**Recommendation:** We submit that the proposed legislation incorporates an optional disclosure that allows Public CBC Reporting Entities the ability to include additional information to assist with the interpretation of the disclosures. For example, such information may include a hyperlink to existing publicly reported information relating to the broader group, other GRI standards which have been voluntarily applied and total tax contribution reporting. This disclosure would be in addition to the qualitative based disclosures in s3d(5)(b).

**Recommendation:** We also submit that the Commissioner should produce - or endorse - publicly available guidance to assist consumers with how to interpret the information (for example, that corporate income tax is levied on profits, which are net of expenses, rather than gross revenues). This guidance should also outline the definitions of the various disclosures that allow a non taxation specialist to interpret the data (for example, the Effective Tax Rate calculation).

## **Appendix 2 - the unique Australian Public CBC disclosures (the Additional Disclosures)**

### **Issues arising from the scope and nature the Additional Disclosures**

We remain of the view expressed in the PwC Submission (dated 2 September 2022) to the Treasury Consultation Paper that the new tax transparency measures should adopt reporting requirements that are consistent with established reporting and transparency regimes (such as OECD CBC reporting or Voluntary Tax Transparency reporting measures) so as to minimise the compliance burden on taxpayers. Further, the GRI 207 standard should not be used as a basis for mandatory reporting requirements as many taxpayers simply do not currently collect the data required to be reported in accordance with these voluntary disclosure requirements.

Aside from the above, and most concerning to several stakeholders, are the Additional Disclosures not included in OECD CBC Report, the EU Directive and nor the GRI 207. These Additional Disclosures are cited to have been selected for inclusion based on the view that the presence of related party transactions and increases in intangible assets are specific indicators of corporate governance risk such that they would complement the GRI 207 disclosures<sup>12</sup>.

The Additional Disclosures require the following information to be prepared and published on a country by country basis for **each jurisdiction**, as follows:

1. a list of tangible and intangible assets held by the group in each jurisdiction (s3D(6)(g)), and book values of those assets (s3D(6)(h)) as at the end of the income year;
2. expenses arising from transactions with related parties that are not tax residents of the jurisdiction (s3D(6)(e));
3. an explanation of why current year income tax accrued (s3D(6)(j)) differs from the profit or loss before tax (s3D(6)(f)) multiplied by the income tax rate applicable (s3D(6)(l)); and
4. the effective tax rate (s3D(6)(k)). This calculation should be calculated consistently with Article 5.1 of the Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS (2021) of the OECD.

As noted above, there are significant concerns relating to mandating a requirement for Public CBC Reporting Entities to publish confidentially constrained or legally prohibited information. This is particularly relevant in the context of the Additional Disclosures which, based on the

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<sup>12</sup> Explanatory Materials, paragraph 1.19.

proposed legislative text, significantly compounds concerns relating to administrative burden in complying the information, associated costs of compliance and may result in added confusion and again may undermine policy objectives of improving transparency.

Separately, the Additional Disclosures are completely new and have not achieved any form of consultation or consensus given the Exposure Draft is the first time these proposed disclosures have been announced. Based on our discussions and interest on this topic with other stakeholders, the Additional Disclosures will likely be a significant area of contention.

**Recommendation:** We therefore recommend that these Additional Disclosures are excluded from the Exposure Draft until further consultation with stakeholders to properly ascertain and define the information required and to determine whether this is in fact necessary.

At a minimum we submit that the requirements for information as set out in proposed section 3D (6)(e), (g), (k) (l) and (m) are further deferred years to income year starting on or after 1 July 2026 to allow for more detailed consultation internationally and guidance and clarity on the scope be provided.

#### **Concerns relating to specific Additional disclosures**

*s3D(6)(g) A list of tangible and intangible assets held by the group in each jurisdiction, and s3D(6)(h) book values of those assets*

The Exposure Draft requires disclosures relating to “a list of tangibles and intangible assets as at the end of the income year” (s3D(6)(g)) and “the book value at the end of the income year of tangible and intangible assets, other than cash and cash equivalents” (s3D(6)(h)).

At present it is entirely unclear what constitutes “a list”, the categories of assets and level of disaggregation that is envisaged under the proposed legislation. Large MNE’s will likely have a significant number of individual assets and therefore a list of individual assets will be practically impossible to provide on a group basis (notwithstanding the confidentiality concerns raised above).

It is highly likely that the greater the level of disaggregation the more likely that the requirement will be administratively cumbersome and the more likely that information published is going to be commercially sensitive.

We note that given the differences in book values due to differences in accounting for internally generated intangible assets from acquired assets means that comparison across jurisdictions or companies is likely to be meaningless.

**Recommendation:** Consistent with the above recommendations, clarification as to the definitional requirements of s3D(6)(g) and s3D(6)(h) should be captured as part of the broader consultation process concerning the Additional Disclosures.

To the extent our recommendation to defer implementation is not adopted, then we submit that information relating to disclosures in s3D(6)(g) and s3D(6)(h) be aggregated into 'Total Tangible Assets' and 'Total Intangible Assets'.

*s3D(6)(k) effective tax rate*

Section 3D(7)(d) provides that the Effective tax rate (**ETR**) calculation for each jurisdiction to be calculated to best achieve consistency with Article 5.1 of the Tax Challenges Arising from Digitalisation of the Economy - Global Anti-Base Erosion Models (Pillar Two): Inclusive Framework of BEPS (2021) of the OECD (collectively known as the **Pillar Two Rules**). The Pillar Two rules are extremely complex and, for many taxpayers, there are currently system limitations that do not currently capture the necessary data required to compute the calculations.

The inclusion of the disclosure requirements in s3D(6)(k) before the Pillar Two rules come into place effectively brings forward reporting requirements of a new system of tax, globally, which will impose a significant administrative and compliance burden on taxpayers.

**Recommendations:** we make the following submissions:

1. Public CBC Reporting Entities should not be required to prepare a Pillar Two ETR calculation if they are not subject to the Pillar Two regime. While the majority of the population will overlap, the triggers for Pillar Two (based on the OECD model rules) are slightly different (including looking at global income over a four year period), and therefore not all entities in the scope of the Public CBC Reporting rules will be subject to Pillar Two.
2. There should be a mechanism incorporated into the Exposure Draft that acknowledges that the ETR can be calculated in accordance with the Pillar Two Transitional Safe Harbour guidance for the period in which the transitional safe harbours apply.
3. If calculations are required to be consistent with Pillar Two, the due date for submitting the approved Public CBC Reporting approved form should not be earlier than the due date for Pillar Two returns. Under the OECD model rules, this is 15 months after the ultimate parent entity's year-end (i.e. 3 months later than the proposed Public CBC Reporting due date).

### **Appendix 3 - Further administrative guidance required and implementation considerations**

#### **Further guidance and clarification in relation to penalties is required**

The Exposure Draft provides that penalties will apply for non-compliance. Specifically, Australia's tax laws have a number of existing general offence and penalty provisions. Australian resident entities will be subject to the penalties under section 8E of the TAA if they commit an offence under section 8C of the TAA by refusing or failing to comply with their obligation to publish the selected tax information. Section 8C of the TAA will be amended to ensure it applies to this obligation.

The potential range of penalties and sanctions for offences under the TAA are severe and reflect the importance of ensuring the integrity of the Australian taxation system by permitting the strongest possible powers for the Commissioner to request information for the purposes of determining tax liabilities in Australia.

However, we respectfully note that the proposed legislation is for the purpose of allowing publication of information not determining tax liability in Australia. Most of the information required will already be available to the Commissioner of Taxation through OECD CBC Report or in the public domain (in the case of companies that are already voluntarily disclosing under GRI 207). The penalty regime and consequences for companies should be proportionate to the risk.

The penalty regime under Australian taxation law provides significant discretion to the Commissioner of Taxation as to how penalties will be applied and in what circumstances remissions might be appropriate. The fact that non-resident taxpayers, many of which will be unfamiliar with the complexities of the penalty regime under Australia's taxation law, means that it is only fair and reasonable to expect this to be more explicitly set out.

**Recommendation:** We submit that the penalty regime for non-compliance, particularly for non-resident CBC reporting parents should be made clearer. In considering appropriate approaches to penalties consideration should be given to the fact that the information provided to the Commissioner for the purposes of publication should be considered differently from information that is provided to the Commissioner of Taxation that is relevant for the purposes of determining the income tax liability or obligations of a taxpayer. The majority of non-resident CBC Reporting Parents that are non-residents of Australia will not themselves have a tax liability or tax presence in Australia. This should be considered in developing an appropriate penalty regime.



To the extent that our recommendation to defer the commencement of this measure is not accepted, we would request that no penalties be imposed for the first year of implementation and that an appropriate penalty regime be developed in consultation for future periods.

We would welcome and strongly encourage early guidance from the Commissioner on how these penalty provisions are to be administered as there will be a large number of non-resident CBC Reporting Parents that may have limited familiarity with the range of penalties under Australia's tax laws. This should include the approach taken to errors in disclosure and/or failure to disclose particular items of information that are not readily available.

**Practical considerations relating to implementation of the Public CBC Reporting measures and necessitation of resources required by the Commissioner**

*Resources, processes and guidance material requirements*

The Exposure Draft and Explanatory Materials demonstrate that there are several mechanisms that will require action from the Commissioner under the proposed measures, including:

1. Providing written notice allowing an entity to adopt a date other than 30 June as their income year under s3D(2) and s3D(3);
2. Defining and designing the "approved form" in which the information must be provided;
3. Making the Public CBC Reports available on an Australian government website under 3D(s10), including where relevant, corrections to those reports under s3(D)(12);
4. Defining classes of entities that may be exempted, as well as particular entities and pieces of information that may be exempted under s3D(13), s3D(14) and s3D(15).

From our experience when the OECD CBC Reporting rules were introduced, these administrative responsibilities will create significant additional work (and time) for the Commissioner and there will need to be adequate resources available to manage this and ensure a smooth transition for stakeholders. More specifically, there was approximately a two year timeframe from enactment of the OECD CBC Reporting rules in Australia to the earliest lodgement date. However, the approved form, validation rules and guidance was not finalised until much closer to the due date. Given the scope and novel nature of the Public CBC Report disclosures, as well as the fact that most CBC Reporting Entities will be based in foreign jurisdictions (and unfamiliar with the Commissioner's processes), a similar time frame for a smooth transition is unrealistic.

Further, the more that practical guidance and measures that can be adopted widely are introduced, as opposed to administrative measures requiring direct Commissioner

involvement in each case, the more efficiently these matters will be able to be managed. This would be beneficial for both the Commissioner and taxpayers. For example, when the CBC Reporting rules were first introduced, individual taxpayers needed to seek the Commissioner's specific approval to adopt a "replacement reporting period" for CBC Report purposes, and more recently the Commissioner's guidance allows taxpayers to self-assess this. Similar public guidance from the Commissioner enabling entities to self-assess their reporting period under s3D(2) and s3D(3) would be essential to avoid an unnecessary administrative burden.

#### *Stationery and system requirements*

We also note that if the "approved form" will, similar to the OECD CBC Report and Local File, require taxpayers to file in a specific XML format designed by the ATO with strict validation rules that must be passed to be able to lodge the form, it will likely take the Commissioner, taxpayers and software providers a significant period of time to prepare for this obligation and the lead time before the first filings will be due is very short. It will be important for the approved form to be confirmed by the Commissioner as early as possible and, it would be beneficial if the legislation and/or explanatory materials acknowledge that deferrals may be required if there are delays in the Commissioner finalising the approved form for a particular income year.

#### **Alignment of test income year of CBC reporting entities to that of the OECD CBC Reporting Entity<sup>13</sup> definition under existing OECD Reporting requirements**

In terms of timing, the existing OECD CBC Reporting requirements apply to an entity if it was an OECD CBC reporting entity in the prior year. This was a design feature of the OECD CBC Reporting guidance to allow entities that exceed the threshold for the first time sufficient time to prepare before their first reporting year. The draft Public CBC Reporting measures apply to an entity if it is a CBC Reporting Parent in the current income year, which would mean these requirements would apply one year earlier than the existing OECD CBC Reporting requirements. It would be onerous to expect an entity to effectively publish OECD CBC Report information, plus the GRI 207 information and the Additional Disclosures before they are required to lodge the OECD CBC Report.

**Recommendation:** We recommend that this be clarified in the legislation to ensure it is clear that there is no intent for these more onerous reporting requirements to apply before the existing OECD CBC Report obligations apply to an entity.

#### **Other considerations of the Commissioner's role**

##### *Deferrals*

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<sup>13</sup> As defined in Subdivision 815-E of the ITAA 1997 for purposes of the OECD CBC Reporting requirements.

The drafts do not explicitly acknowledge the Commissioner's ability to grant deferrals. We assume this will be possible under the Commissioner's power under section 388-55 of Schedule 1 of the TAA.

**Recommendation:** We recommend that explicit confirmation is provided that the Commissioner has the power under section 388-55 of Schedule 1 of the TAA to grant deferrals. Guidance around the process and circumstances pertaining to deferrals should also be provided as part of the broader administrative package.

#### *Review activity*

The Explanatory Materials explains that the selected tax information published by the reporting entity must be sourced from audited consolidated financial statements, consistent with the EU Directive 2021/2101. The intent is for the data to be reconcilable and verifiable, and of a generally high standard for public release, without necessitating additional auditing.<sup>14</sup>

**Recommendation:** Further guidance should be provided by the Commissioner to explain the review activity following implementation of the Public CBC Reporting measures. This guidance should be consulted upon with stakeholders and address the extent and scope of Commissioner review activity, as well as the information that the Commissioner would expect of Public CBC Reporting Entities to provide in the event of such a review. These review powers should also align with the review processes and powers of other global reporting regimes.

#### *Corrections and amendment periods*

Section S3D(11) provides that if an entity becomes aware that if a Public CBC Report previously given to the Commissioner contains an error, it must, as soon as practicable, give the Commissioner a notice in writing containing information that corrects the error in the approved form. There is currently no statutory limitation to the amendment period. It is therefore a perpetual requirement which is impractical and may also conflict with data retention policies, regulations and legislative requirements in jurisdictions in which Public CBC Reporting Entities operate.

**Recommendation:** we submit that an amendment period be limited to four years from the date of lodgement of the Public CBC Report to the Commissioner (aligned with the amendment period applied to the corporate income tax return).

#### *Post implementation review*

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<sup>14</sup> The intent is for the data to be reconcilable and verifiable, and of a generally high standard for public release, without necessitating additional auditing.



There does not appear to be commentary demonstrating an intention to undertake a post implementation review in the Exposure Draft or to in the Explanatory Materials.

**Recommendation:** we recommend that a post-implementation review be undertaken within three years of implementation of the proposals to understand the practical consequences, issues which have emerged since their introduction and whether the stated policy objectives have been met. Such a review should involve the comparison and extent of overlap with any other global regimes that have been implemented, as well as impact that the measures have had on global investment into Australia and on compliance costs.

#### **Appendix 4 - Definitional issues and challenges arising from the draft legislative text**

Appendices 1 and 2 outline our comments relating to the scope of the disclosures mandated in the Exposure Draft. These comments have had regard to established global reporting regimes, the multilateral processes underpinning these to achieve the appropriate balance and the nature of the Public CBC Report disclosures themselves. In this Appendix, we set out below definitional issues and challenges arising from specific disclosures required in the Exposure Draft. These issues largely stem from inherent differences in disclosure requirements across reporting regimes which may undermine the policy objectives of greater transparency and public scrutiny if appropriate comparisons can not be drawn.

Section 3D(7) provides guidance on how to identify the particular information required to be reported and draws in documents that can be used to achieve best consistency. However, the use of the language *"to the extent they are relevant"* makes it abundantly clear that the specific requirements of the legislation take primacy over the materials in proposed 3D(7)(a) to (e). This means that it is unlikely that the objectives stated in the Explanatory Materials that the compliance burden should be reduced because entities are already familiar with the interpretation of CBC reporting - will be realised. This is because any flexibility created in the approach to OECD CBC reporting will be lost in favour of the specific requirements of the Australian legislative requirements.

##### *Inconsistencies with OECD CBC Reporting disclosures*

We acknowledge and agree with that the inclusion of OECD CBC reporting guidance should *"reduce the compliance burden on entities as they are already familiar with its interpretation as it is used by these entities in meeting their existing obligations for confidential CBC reporting under paragraph 815-355(3)(c) of the ITAA 1997"*<sup>15</sup>. However, the Exposure Draft adopts different definitional requirements of comparable disclosures in the OECD CBC Report and therefore the drafting of the Exposure Draft does not align with the stated objective.

For example, the Exposure Draft requires jurisdictional disclosures under s3D(5) to be based on amounts as shown in the audited consolidated financial statements for the entity for the period that corresponds to the income year whereas the OECD CBC Report requirements require aggregation of information by tax jurisdiction. As a result, the OECD CBC Report disclosures will not be able to be transposed into the Public CBC Report.

Similarly, the disclosure requirement relating to the number of employees at the end of the income year (s3D(6)(b)), is inconsistent with the OECD CBC Report which allows the number

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<sup>15</sup> Explanatory Materials, paragraph 1.22

of employees to be reported on FTE basis as of the year end, average FTE basis for the year, or any other basis. A reasonable approximation or rounding is also permissible<sup>16</sup>.

*Public CBC Report, OECD CBC Report and GRI 207 standards adopt different definitions across disclosures*

We note that there are a number of overlapping requirements with OECD CBC and GRI 207 Reports. However, there are fundamental differences between the disclosure requirements of each regime which currently make the machinery in the Exposure Draft inoperable, specifically in s3D(7)(b) and s3D(7)(c) which requires consistency of disclosures with the OECD CBC Report and GRI 207 standards.

For example, in terms of revenue, GRI 207 requires revenue by jurisdiction on a consolidated basis. Revenue under this definition includes revenues from third-party sales for each tax jurisdiction and from intra-group transactions between that jurisdiction and other tax jurisdictions. However, revenue as required by the OECD CBC Report disclosure is required by tax jurisdiction on an aggregated basis and includes (i) revenues of all the Constituent Entities of the MNE group in the relevant tax jurisdiction generated from transactions with associated enterprises (including domestically); (ii) the sum of revenues of all the Constituent Entities of the MNE group in the relevant tax jurisdiction generated from transactions with independent parties; and (iii) the total of (i) and (ii).

The Exposure Draft however requires revenues to third parties and international related parties based on amounts as shown in the audited consolidated financial statements for the entity which is a combination of the OECD CBC Report and GRI 207 definitions.

**Recommendation:** To limit the compliance burden of these measures, and to avoid creating a welter of conflicting definitions for comparable disclosure requirements, we recommend that CBC Reporting Entities be allowed flexibility to select the relevant disclosure definitions that are consistent with established reporting regimes. Specifically, these regimes would include the OECD CBC report requirements, GRI 207 and the EU Directive. We recommend that CBC Reporting Entities accompany these disclosures with the relevant standard that has been adopted so they can be appropriately understood. The relevant standard applied should also be applied consistently year on year to allow for appropriate comparison across time periods. Further to our recommendation in Appendix 1, to assist readers in understanding and interpreting the disclosures of the relevant reporting standard applied, the Commissioner should provide the appropriate guidance which explains the definitions underpinning each disclosure that allows a non taxation specialist to interpret the data.

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<sup>16</sup> The Exposure Draft definition is also inconsistent with the GRI 207. Under GRI 207, reporting entities may also use an appropriate calculation such as head count at the end of the time period reported or a FTE calculation.



### *Inconsistencies between the Exposure Draft and the Explanatory Materials*

There are inconsistencies with the way the Exposure Draft and the Explanatory Materials have been drafted, particularly as it relates to timing of implementation. More specifically, the Explanatory Materials indicates that the Exposure Draft requirements are intended to apply to years beginning on or after 1 July 2023, while the Exposure Draft indicates that the measures will apply to the 2023/24 income years onwards. For 31 December early-balancing substituted accounting period taxpayers, this reference to the 2023-24 income year would mean commencement from 1 January 2023.

**Recommendation:** We understand the intention is the date referred to in the Explanatory Materials (i.e., years beginning on or after 1 July 2023), and recommend the draft bill be updated to correct this prior to introducing it to Parliament.

## Appendix 5 - Summary of recommendations

Recommendations
<b>Appendix 1 - Alignment with other global reporting regimes</b>
<p><b>Recommendation:</b> We submit that the commencement date is amended to apply to no earlier than income years starting on or after 1 July 2025.</p> <p>If there is no change to the proposed commencement date for the consultation process, then another option to proportionately allow more taxpayers more time to prepare the disclosures is to adopt a staggered introduction of these measures based on;</p> <ul style="list-style-type: none"> <li>c. Materiality thresholds. Well established materiality thresholds that are already contained in Australian legislation or in tax filing requirements enforced by the Commissioner could be used as a basis;</li> <li>d. A level of disclosure which is more consistent with the approach undertaken in the EU Directive.</li> </ul>
<p><b>Recommendation:</b> We submit that the Exposure Draft includes a mechanism which, similar to the GRI 207-4 standard, allows the reporting entity the ability to omit confidential and legally prohibited information which is accompanied with a supporting disclosure outlining the relevant reasoning based on a prescribed and agreed standard. As part of this mechanism, we recommend that stakeholder input is sought to develop the relevant omission standards.</p> <p>If the process is to involve a formal exemption process, this should be developed via consultation with stakeholders globally, and the appropriate guidance as to how such a process would work be developed. This guidance would also need to explain the evidence required to substantiate the omission of information (without surrendering the confidential or legally prohibited information during the process). This option however would be administratively cumbersome for reporting entities, the Commissioner and would be difficult to apply in practice without significant resources employed.</p>
<p><b>Recommendation:</b> We submit that similar threshold requirements are incorporated into the Exposure Draft so as not to disproportionately disadvantage CBC reporting parents with limited or small Australian activities or adversely impact decisions of foreign MNE's entering into the Australian market. We recommend that these thresholds are aligned to those in the EU Directive.</p>



We also submit that a similar threshold requirement is applied to Australian tax resident CBC Reporting Entities such that overseas members of the CBC reporting group that fall below the specified threshold requirement will fall outside the scope of the Public CBC Report until those thresholds are exceeded.

**Recommendation:** We submit that the jurisdictional basis upon which the Public CBC Reporting requirements be broadly aligned to the EU Directive. This approach would involve publishing disaggregated information on an audited consolidated basis for:

- Australian tax resident entities; and
- additional 'in scope' countries, which could include;
  - Non-cooperative jurisdictions on the EU's blacklist; and
  - Jurisdictions that do not yet comply with all international tax standards but have committed which are contained on EU's grey list; and
  - EU member jurisdictions to the extent that they are required to report under the EU Directive.

Jurisdictions that do not meet these requirements would be aggregated on a consistent basis with the EU Directive approach. The financial information would be aggregated on an audited consolidated financial statement basis.

**Recommendation:** We submit that the proposed legislation incorporates an optional disclosure that allows Public CBC Reporting Entities the ability to include additional information to assist with the interpretation of the disclosures. For example, such information may include a hyperlink to existing publicly reported information relating to the broader group, other GRI standards which have been voluntarily applied and total tax contribution reporting. This disclosure would be in addition to the qualitative based disclosures in s3d(5)(b).

**Recommendation:** We submit that the Commissioner should produce publicly available guidance to assist consumers with how to interpret the information (for example, that corporate income tax is levied on profits, which are net of expenses, rather than gross revenues). This guidance should also outline the definition of the various disclosures that allows a non taxation specialist to interpret the data (for example, the ETR calculation).

## **Appendix 2 - the unique Australian Public CbC disclosures**

**Recommendation:** We recommend that the Additional Disclosures are excluded from the Exposure Draft until further work is in consultation with stakeholders to properly

ascertain and define the information required and to determine whether this is in fact necessary.

At a minimum we submit that the requirements for information as set out in proposed section 3D (6)(e), (g), (k) (l) and (m) are further deferred years to income year starting on or after 1 July 2026 to allow more detailed consultation internationally and guidance and clarity on the scope and need for this information to be provided.

**Recommendation:** We submit that clarification as to the definitional requirements of s3D(6)(g) and s3D(6)(h) be captured as part of the broader consultation process concerning the Additional Disclosure.

To the extent our recommendation to defer implementation is not adopted, then we submit that information relating to disclosures in s3D6(g) and s3D6(h) be aggregated into 'Total Tangible Assets' and 'Total Intangible Assets'.

**Recommendations:** we make the following submissions relating to the ETR disclosure requirements:

1. Public CBC Reporting Entities should not be required to prepare a Pillar Two ETR calculation if they are not subject to the Pillar Two regime. While the majority of the population will overlap, the triggers for Pillar Two (based on the OECD model rules) are slightly different (including looking at global income over a four year period), and therefore not all entities in the scope of the Public CBC Reporting rules will be subject to Pillar Two.
2. There should be a mechanism incorporated into the Exposure Draft that acknowledges that the ETR can be calculated in accordance with the Pillar Two Transitional Safe Harbour guidance for the period in which the transitional safe harbours apply.
3. If calculations are required to be consistent with Pillar Two, the due date for submitting the approved Public CBC Reporting approved form should not be earlier than the due date for Pillar Two returns. Under the OECD model rules, this is 15 months after the ultimate parent entity's year-end (i.e. 3 months later than the proposed Public CBC Reporting due date).

**Appendix 3 - further administrative guidance required and implementation considerations**

**Recommendation:** We submit that the penalty regime for non-compliance, particularly for non-resident CBC reporting parents should be made clearer. In considering appropriate approaches to penalties consideration should be given to the fact that the information provided to the Commissioner for the purposes of publication should be considered differently from information that is provided to the Commissioner of Taxation that is relevant for the purposes of determining the income tax liability or obligations of a taxpayer. The majority of non-resident CBC Reporting Parents that are non-residents of Australia will not have a tax liability or tax presence in Australia. This should be considered in developing an appropriate penalty regime.

To the extent that our recommendation to defer the commencement of this measure is not accepted, we would request that no penalties be imposed for the first year of implementation and that an appropriate penalty regime be developed in consultation for future periods.

**Recommendation:** we recommend that the test income year for CBC Reporting Entities be clarified in the law to ensure it is clear that there is no intent for these more onerous reporting requirements to apply before the existing CBC Report obligations apply to an entity.

**Recommendation:** We recommend that explicit confirmation is provided to confirm that the Commissioner has the power under section 388-55 of Schedule 1 of the TAA to grant deferrals. Guidance around the process and circumstances pertaining to deferrals should also be provided as part of the broader administrative package.

**Recommendation:** Further guidance should be provided by the Commissioner to explain the review activity following implementation of the Public CBC Reporting measures. This guidance should be consulted upon with stakeholders and address the extent and scope of Commissioner review activity, as well as the information that the Commissioner would expect of CBC Reporting Entities to provide in the event of such a review. These review powers should also align with the review processes and powers of other global reporting regimes.

**Recommendation:** we submit that an amendment period be limited to four years from the date of lodgement of the Public CBC Report to the Commissioner (aligned with the amendment period applied to the corporate income tax return).

**Recommendation:** we recommend that a post-implementation review be undertaken within three years of implementation of the proposals to understand the practical consequences and issues which have emerged since their introduction. Such a review should involve the comparison and extent of overlap with any other global regimes that

have been implemented, as well as impact that the measures have had on global investment into Australia and on compliance costs.

#### **Appendix 4 - Definitional issues and challenges arising from the draft legislative text**

**Recommendation:** To limit the compliance burden of these measures, and to avoid creating a welter of conflicting definitions for comparative disclosure requirements, we recommend that CBC Reporting Entities be allowed flexibility to select the relevant disclosure definitions that are consistent with established reporting regimes. Specifically, these regimes would include the OECD CBC report requirements, GRI 207 and the EU Directive. We recommend that CBC Reporting Entities accompany these disclosures with the relevant standard that has been adopted so they can be appropriately understood. The relevant standard applied should also be applied consistently year on year to allow for appropriate comparison across time periods.

**Recommendation:** We understand the intention for the commencement date of these measures is income years beginning on or after 1 July 2023. We recommend the draft bill be updated to make this clear prior to introducing it to Parliament.