BCA
Business Council of Australia

Public country-by-country reporting exposure draft – February 2024

BCA Submission

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1. Overview

The Business Council welcomes the opportunity to provide a submission to the consultation on the February 2024 exposure draft for public country-by-country (CbC) reporting.

The proposed changes will significantly expand tax transparency requirements for large companies operating in Australia. The BCA has previously proposed that tax transparency disclosures be guided by a set of principles. This ensures stakeholders are better informed through meaningful data, commercial confidentiality is maintained, compliance costs are minimised and consistency with international reporting obligations is preserved. The BCA welcomes the changes in this exposure draft, which demonstrates that some of the concerns raised by business have been heard. However, further changes to this exposure draft are needed to ensure the policy aligns with these principles and better delivers on the policy intent. This includes not unnecessarily increasing compliance costs.

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

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

It is critical the proposed reporting scheme delivers a more informed debate about the tax affairs of large companies. The proposal will introduce another unique reporting measure that sits alongside several other public reporting measures in Australia and internationally, each with different quantitative and qualitative data published for different purposes. The requirement to report more – and different – data will not better inform stakeholders without further context or consistency with other reporting measures. Nor will it help better inform stakeholders whether the "right" amount of tax is paid. Inconsistent reporting standards will lead to poorer policy debates than universal standards because the inconsistency itself creates the potential for flawed comparisons and misguided conclusions. This does not assist the government in assuring the public that everyone is paying the right amount of tax. If there is a genuine desire to improve tax transparency and better inform the debate, the starting point must be to rationalise any proposed reporting measure with existing reporting measures rather than a unilateral approach.

The data will presumably be accessible via spreadsheets that are impenetrable for most potential users. To illustrate, the ATO uses its own expertise, experience and knowledge alongside its powerful and extensive information collecting abilities to currently analyse much of this data, including through the OECD's confidential CbC reporting initiative. This is to better understand companies, their tax arrangements and ensure the right amount of tax is paid. For large companies, this is done on a company-by-company basis. The ATO notes "our tax gap or tax performance program therefore demonstrates that the current state of the tax system in Australia is in good shape. We have one of the strongest corporate tax compliance levels in the world."[2]

The proposed changes will increase the cost of doing business in Australia, alongside several tax and other related reporting and regulatory measures. It is critical to maintain a competitive business environment, while signalling to investors that Australia is open for business. They also risk undermining Australia's participation in the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting and other multilateral commitments.

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[1] https://www.ato.gov.au/about-ato/learn-about-tax-and-the-ato/tax-and-corporate-australia/we-are-an-active-and-capable-administrator
[2] https://www.ato.gov.au/media-centre/tax-the-silent-t-in-esg

2. Key recommendations

- Recommendation 1 – Tax transparency proposals should align with the EU approach to CbC reporting including removing the requirement to source from audited consolidated financial statements, the provision of safeguards for commercially sensitive data and reporting jurisdictions outside of Australia.
- Recommendation 2 – Legislation for any proposed tax transparency fields should clearly identify which reporting guidance to follow.
- Recommendation 3 – Develop a clear, consistent and coherent set of criteria, as well as a robust process, for determining reporting jurisdictions. This could include alignment with EU reporting or removing jurisdictions with a tax rate of at least 15 per cent, commitment to implement OECD Pillar Two, and where Australia already shares OECD CbC reports with/from the jurisdiction.
- Recommendation 4 – To the extent the profit and tax reconciliation reporting field remains, clear guidance around reporting expectations is needed.
- Recommendation 5 – Provide clear guidance and expectations around how to report on 'approach to tax' in a CbC report.
- Recommendation 6 – The impact analysis should consider all relevant compliance costs of the proposed changes – for both companies and the ATO – as well as the benefits.
- Recommendation 7 – The ATO should begin timely consultation to develop guidance to provide companies with clarity around how the proposed changes will operate in practice.
- Recommendation 8 – Require the ATO to publish contextual analysis alongside its publication of Australian public CbC reports.
- Recommendation 9 – Do not proceed with the regulation-making powers that allow for increased reporting or to change the list of jurisdictions without parliamentary approval through legislation.
- Recommendation 10 – Any proposed changes should be subject to a comprehensive assessment that follows best practice principles. This includes the problem to be solved must be well understood, new regulation is subject to cost benefit analysis, adequate time for consultation, and regulation must achieve objectives at least cost.
- Recommendation 11 – Require a post-implementation review to assess the proposed changes against their objectives, including their interaction with other tax transparency measures.

3. Additional information

3.1 Principles for tax transparency

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

- The information provided should be meaningful and better inform the public. This information can be both qualitative and quantitative in nature.
- Compliance costs should be minimised.
- There should be scope for flexibility in how firms provide tax transparency disclosures, such as in how the information is presented, recognising there is no 'one size fits all' approach.

- There should be consistency between domestic and international transparency and reporting measures. This includes clear equivalence provisions between jurisdictions to minimise the reporting burden and costs for companies operating in multiple jurisdictions.

Further changes to this exposure draft are needed to ensure the policy aligns with these principles and better delivers on the policy intent.

3.2 Unclear compliance with BEPS Action Item 13

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

The proposal to publish this data under a different part of the legislation to confidential CbC reporting contravenes the spirit of Australia's international obligations. It also ignores the extensive international political negotiations that accompanied the establishment of this system. To proceed with this approach may negatively impact Australia's relationships with other countries, perceptions around Australia's commitment to multilateral agreements and the willingness of other countries to continue to share CbC reports with Australia.

Of the proposed 41 reporting jurisdictions, Australia currently shares confidential CbC reports with 16, while 26 of those jurisdictions already share confidential CbC reports with Australia. It is critical that this reporting does not undermine this process with these countries, or other countries more broadly.

3.3 Inconsistency with international standards

The proposed reporting requirements continue to be inconsistent with international standards. This will result in uncertainty around the interpretation of the data, unnecessarily increase the compliance burden for companies, and are arguably of little to no benefit for users of the data.

The European Union (EU) standards for CbC reporting provide a suitable template for a similar approach to further tax transparency in Australia. The EU standards have been through rigorous consultation, mindful of the confidentiality around existing OECD confidential CbC disclosures and can deliver on the policy intent while minimising compliance costs for companies.

The differences between Australian, EU, OECD and Global Reporting Initiative (GRI) reporting regimes are subtle but may create uncertainty, inconsistencies and increase compliance costs to track, reconcile and implement the proposal. At the same time, the draft Explanatory Memorandum outlines that "regard should be had to both the OECD CbC reporting guidance and GRI 207 in interpreting the requirements entities must publish under these amendments." This is unclear in practice as there are subtle differences between the two for several reporting fields, and there is no indication which guidance should be followed where conflicts arise. To illustrate:

- Revenue – EU public CBC requires total revenue to be disclosed whereas the Exposure Draft requires both unrelated party and *cross-border* related party revenues to be disclosed. This also diverges from the OECD confidential CbC requirements meaning additional compliance and the publication of Australian data that may not match EU data. The benefits of this approach are unclear.
- Employees – OECD confidential CbC requires reporting on the total number of employees on a full-time equivalent basis, with flexibility to report on any basis as long as it is applied consistently (for example, on year-end or an average over the year). There is also allowance for "reasonable rounding or approximation" provided it does not materially distort figures and is applied consistently.[3] GRI provides for reporting on a head count or full-time equivalent basis – as long as it is applied consistently – while the number of employees can be rounded to the nearest 10 or 100, depending on size.

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L0881

- Data sources – the Exposure Draft requires data to be sourced from audited consolidated financial statements (or an equivalent if not prepared). Some data may not necessarily be included in these statements, including cross-border related party revenues and employee counts. By contrast, OECD confidential CbC and EU CbC allow data from a variety of sources and there is no requirement for sourcing from audited consolidated financial statements. This creates another unnecessary inconsistency with international reporting standards, noting that companies will undertake appropriate assurance processes given these disclosures will be made public and the scrutiny this will attract.

Any ambiguity must be removed and there should be clear instructions around which guidance to follow where there are inconsistencies. This is to both ensure data are reported as consistently as possible, while also minimising compliance costs. This clarity should be provided for in the legislation rather than relying on ATO guidance as part of implementation. There is also an expectation in paragraph 1.32 of the Explanatory Memorandum for companies to publish a link to, or copy of, their EU CbC report when publishing the tax information required by these amendments. But there is no requirement in the legislation or relevant reporting field through which to provide this information. This should be removed from the Explanatory Memorandum.

The reliance on GRI as a benchmark for reporting fields and guidance (as well as potential expansions in reporting fields) remains a conflicting element of this proposal. The success of the broader GRI framework is based on the flexibility for stakeholders to pick the relevant standards that matter to their stakeholders and offering a consistent reporting approach. Flexibility and materiality are central to this voluntary approach but do not neatly fit within the rigid and mandated reporting scheme that is proposed in this draft legislation.

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

Recommendation 1

Tax transparency proposals should align with the EU approach to CbC reporting including removing the requirement to source from audited consolidated financial statements, the provision of safeguards for commercially sensitive data and reporting jurisdictions outside of Australia.

Recommendation 2

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

3.4 Unclear rationale and process around reporting jurisdictions

The rationale for the 41 proposed reporting jurisdictions is unclear. The inconsistency with EU public CbC will increase compliance costs, while the process around selecting the current list of jurisdictions – or future changes – is also unclear. EU CbC will require reporting for around 19 jurisdictions as of today – 12 non-cooperative jurisdictions and nine jurisdictions with pending commitments for two consecutive years.

The EU has a robust process and criteria around identifying non-cooperative jurisdictions for tax purposes, assessment by a Code of Conduct Group (Business Taxation), and engagement with the proposed list of jurisdictions.[4] This list is updated at least twice a year against the following criteria:

- Tax transparency – automatic exchange of tax information, exchange of tax information on request, and membership to the OECD multilateral convention on mutual administrative assistance in tax matters.
- Fair taxation – no harmful preferential tax measures, and no facilitating of offshore structures.
- Anti-BEPS measures – commitment to, and implementation of, OECD anti-BEPS minimum standards.

[4] https://data.consilium.europa.eu/doc/document/ST-6213-2018-INIT/en/pdf

By contrast, the Explanatory Statement notes the 41 proposed jurisdictions for Australian public CbC "are typically associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities". There is no formal process or transparent, robust and objective criteria against which these jurisdictions are assessed – or engagement with the jurisdictions. To the extent the list can be scrutinised by Parliament, there is no clear criteria, as with the EU approach, against which to assess it.

A clear, consistent and coherent set of criteria, as well as a robust process, for determining reporting jurisdictions is therefore critical. This can be achieved by adopting the EU list of non-cooperative tax jurisdictions. Alternatively, a list of jurisdictions could be determined based on other objective and transparent criteria, such as clear criteria within tax secrecy, coupled with a robust process to assess the list (similar to the EU approach). This could include removing jurisdictions with certain characteristics, including :

- corporate tax rate of at least 15 per cent;
- commitment to implement OECD Pillar Two;
- jurisdiction shares OECD confidential CbCs with Australia; and
- jurisdiction receives OECD confidential CbCs from Australia.

Recommendation 3

Develop a clear, consistent and coherent set of criteria, as well as a robust process, for determining reporting jurisdictions. This could include alignment with EU reporting or removing jurisdictions with a tax rate of at least 15 per cent, commitment to implement OECD Pillar Two, and where Australia already shares OECD CbC reports with/from the jurisdiction.

3.5 Other issues

3.5.1 Profit and tax reconciliation

The requirement for a profit and tax reconciliation will significantly add to compliance costs for each jurisdiction where this is published. The expectations around this field are also unclear as the Exposure Draft cites calls for the "reasons" between income tax accrued and profit or loss before income tax. It is unclear if this should be qualitative *and* quantitative in nature (or the level of detail) as GRI 207 provides for flexibility in how this is reported and what is included in the description. In cases where differences are small, a materiality threshold may be prudent. Such reconciliations tend to be complex and difficult to understand without an understanding of domestic tax laws – across potentially more than 40 jurisdictions – and accounting principles.

Recommendation 4

To the extent the profit and tax reconciliation reporting field remains, clear guidance around reporting expectations is needed.

3.5.2 Approach to tax

The requirement to describe a company's 'approach to tax' requires clear, specific guidance that references the exact principles or requirements that are expected. For example, this could include GRI 207-1 but this in itself can be relatively brief or extensive. This may also not be accessible, or difficult to read, for users when the data are published within a spreadsheet as it could contain several paragraphs of text.

Recommendation 5

Provide clear guidance and expectations around how to report on 'approach to tax' in a CbC report.

3.5.3 Compliance costs

The direct compliance costs from this proposal come from setting up systems, preparing data for reporting, reviewing the data, conducting assurance, approval and lodgement. While data should be sourced from audited consolidated financial statements, in practice companies will go through additional assurance processes given these disclosures will be made public and the scrutiny this will attract. This will add to compliance costs and in many cases will not be avoided due to internal governance processes. There will also be indirect compliance costs as companies would typically prepare communications around the public disclosure.

BCA consultation with member companies indicates less than 20 per cent of compliance costs will be a one-off as companies prepare systems and processes for compliance. This will also depend on the available technology and how much of this work is performed internally or with external support. However, the remainder of compliance costs will be ongoing given the ongoing need to review the data, conduct assurance, approve, lodge, prepare public communications etc.

The BCA is available to further engage with Treasury to better support its understanding around the size and nature of compliance costs of the proposed changes.

Recommendation 6

The impact analysis should consider all relevant compliance costs of the proposed changes – for both companies and the ATO – as well as the benefits.

3.5.4 ATO guidance

There is a need for the ATO to prepare the architecture for the scheme and to develop guidance to ensure companies have clarity around compliance and to minimise compliance costs. This is also critical given the significant penalties outlined in the Exposure Draft. Examples include:

- A definition of what constitutes a "material error" that requires correction.
- Clarity around the approved form in which data must be provided (for example, XML or Excel).
- Indications of when data will be made public and potential alignment with other data releases and company reporting.

There is also a need for the ATO to, in consultation with stakeholders, publish accompanying guidance that would support the use and understanding of public CbC reports and ensure that all stakeholders relying on CbC information apply a common language when interpreting the information. This will be a complex undertaking in the context of Australian data, and even more complex when considering other jurisdictions.

Recommendation 7

The ATO should begin timely consultation to develop guidance to provide companies with clarity around how the proposed changes will operate in practice.

3.6 Publication of contextual analysis

The ATO's annual publication of corporate tax transparency data includes the publication of total income, taxable income and tax payable. On their own, these data are not meaningful, so the ATO accompanies the release with extensive contextual analysis to help users better understand and interpret the data. Similarly, some companies publish tax transparency reports and/or media releases to help explain and contextualise the reported figures.[5] The ATO should publish similar analysis for the proposed public CbC reporting, recognising this will be a significant and complex exercise – and one of critical importance.

[5] For example https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/in-detail/tax-transparency/corporate-tax-transparency-report-2021-22

There is an obligation on those engaging in the tax debate and analysing public CbC data to be rigorous and to understand the operational elements that underpin and explain a company's tax affairs. Misinterpretation and misrepresentation of facts can unnecessarily undermine the community's confidence in the integrity of our tax system and distort any debate.

Whether these data are analysed on their own or collectively, it can be inherently complex to understand a company's tax affairs – even in the simplest of circumstances. This becomes more complex where company supply chains or operations are disaggregated across the globe. The ATO uses its own expertise, experience and knowledge alongside its powerful and extensive information-collecting abilities to better understand companies, their tax arrangements and ensure the right amount of tax is paid. This is done on a company-by-company basis and the ATO observes "we have one of the strongest corporate tax compliance levels in the world."[6]

Recommendation 8
Require the ATO to publish contextual analysis alongside its publication of Australian public CbC reports.

3.7 Ongoing uncertainty

The proposed changes provide a regulation-making power for governments to prescribe changes to reporting requirements over time without parliamentary approval. This includes to both require the publication of additional information, as well as to change the list of reporting jurisdictions. The draft Explanatory Memorandum argues this is "to ensure the requirements are kept up to date and reflect changes in the tax landscape" and "to allow the Government to consider current and emerging circumstances and respond in a timely manner."

These arguments around timeliness are flawed as the data in question are already accessible by the ATO for the purposes of ensuring the right amount of tax is paid. Companies will also need sufficient time to be made aware of changes to be able to comply, meaning these changes cannot be rushed. The Parliament regularly sits – for example, there are 18 sitting weeks in 2024 – meaning there is ample opportunity to legislate any changes in a timely manner.

It is also argued this approach will "provide taxpayers with certainty". Rather, this provides taxpayers with ongoing uncertainty around their reporting requirements and a limitless – and unconditional – expansion of reporting requirements. This uncertainty stems from both the regulation-making powers and that existing requirements are not anchored to a coherent approach or common reporting standard. To illustrate:

- The proposed reporting requirements reflect a mix of multiple reporting standards.
- There is no clear rationale or process around the selection of reporting jurisdictions.

The Explanatory Memorandum also notes that "the regulations would be subject to disallowance and therefore would be subject to appropriate parliamentary scrutiny." In practice, there have been an average of around four disallowed instruments a year the past 20 years, compared with an average of around 1,900 disallowable instruments.[7]

Recommendation 9
Do not proceed with the regulation-making powers that allow for increased reporting or to change the list of jurisdictions without parliamentary approval through legislation.

[6] https://www.ato.gov.au/Media-centre/Speeches/Other/Tax--the-silent-T-in-ESG/
[7] https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15; https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Disallowance_alert

3.8 Thorough impact analysis and consultation

The proposed changes must be put through a comprehensive policy development or assessment process that follows best practice principles. This includes clarity around how many companies are expected to be impacted by the proposal, including the costs and benefits. The Office of Impact Analysis notes new policies should:

- clearly identify and define the problem to be solved;
- clearly identify a legitimate reason for government action;
- identify a range of genuine policy options;
- identify the net benefits of each option;
- explain the purpose and objectives of consultation;
- indicate the preferred option; and
- discuss what success looks like and how it will be achieved.[8]

The consultation period for the proposed measure is again unreasonably short given the proposal is due to commence in four months and myriad of other issues currently out for consultation. The draft legislation is again out for just 22 days of consultation. The BCA notes that the Best Practice Consultation Guidance Note issued by the Department of Prime Minister and Cabinet recommends a minimum consultation period of 30 days.[9]

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

Recommendation 10

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

3.9 Post-implementation review

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

- the ATO's corporate tax transparency release;
- publication of tax transparency reports;
- public reporting within annual reports/financial statements; and
- the EU's public CbC reporting directive.[10]

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

The proposal introduces another unique reporting measure with additional, detailed reporting requirements. If there is a genuine desire to improve tax transparency and better inform the debate, the starting point must be to rationalise any proposed reporting measure with existing reporting measures rather than a unilateral approach.

[8] https://oia.pmc.gov.au/resources/guidance-impact-analysis/7-impact-analysis-questions
[9] Best Practice Consultation, Department of Prime Minister and Cabinet, July 2023. https://oia.pmc.gov.au/sites/default/files/2023-08/best-practice-consultation.pdf
[10] Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021

The requirement to report more – and different – data will not better inform stakeholders without further context or consistency with other reporting measures. Nor will it help better inform stakeholders whether the "right" amount of tax is paid. Inconsistent reporting standards will lead to poorer policy debates than universal standards because the inconsistency itself creates the potential for flawed comparisons and misguided conclusions.

To illustrate, the ATO's annual publication of corporate tax transparency data includes the publication of total income, taxable income and tax payable. This proposal for Australian public CbC will see the publication of revenue, profit or loss before income tax and income tax on a cash and accrual basis. This will see different numbers published for what are effectively the same data.

The proposed changes should be subject to a post-implementation review that assesses the proposed changes against their objectives. That is, how do these disclosures "improve information flows to help the public, including investors, to compare entity tax disclosures, to better assess whether an entity's economic presence in a jurisdiction aligns with the amount of tax they pay in that jurisdiction." This review should also consider how Australian public CbC sits alongside other tax transparency measures, including how they have been used/prioritised, the impact of large volumes of information, the impact of the disparity in information published, and how tax transparency affects decision making across all stakeholders.

Recommendation 11

Require a post-implementation review to assess the proposed changes against their objectives, including their interaction with other tax transparency measures.

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