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Director
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Dear Sir / Madam

Submission on multinational tax transparency – tax changes (Public CbC reporting)

This submission provides our comments on the Exposure Draft of the *Treasury Laws Amendment Bill 2024: Multinational tax transparency—country by country reporting* issued on 12 February 2024 (Exposure Draft), together with the draft Determination of specified countries (Draft Determination) and the accompanying draft explanatory materials (Draft EM and ES).

The comments in our submission are made in good faith with the intention of considering whether the Bill as drafted is giving effect to our understanding of the policy objectives, does not give rise to unintended consequences, and is drafted in the best manner to facilitate the administration of the law and compliance with the law.

Our submission comments are in the attached appendix. We would be pleased to discuss any aspect further. Please contact any of Sharon Murray, David Letos or David Watkins (0498 344 000).

Yours faithfully

David Watkins
Partner

Deloitte.

Appendix A. Submission

We acknowledge that this version of the Exposure Draft incorporates many of the recommendations we (and other stakeholders) made in respect of the original Exposure Draft released on 6 April 2023 (the April 2023 ED), including:

- Better alignment with the scope of existing domestic and international reporting obligations, including the removal of certain disclosure requirements proposed in the April 2023 ED, which went beyond existing Country-by-Country (CbC) reporting obligations, such as international related party expenses, list of tangible and intangible assets, book value of intangible assets, and effective tax rate disclosures.
- Better alignment with the timing of other reporting obligations, by way of deferring the start date of the regime by 12 months (to income years commencing on or after 1 July 2024), so as to more closely align with reporting based on the European Union Directive 2021/2101 (EU Directive) as well as enabling reporting entities further time to prepare.
- The introduction of a *de minimis* threshold for entities with a small Australian presence, which Treasury has defined as instances where aggregated turnover includes Australian-sourced income of less than AUD 10 million.

Notwithstanding the above, our key submissions on the Exposure Draft are in summary:

- A public CbC reporting regime that operates separate, and in addition to, the existing Organisation for Economic Co-operation and Development (OECD) CbC reporting regime introduces the potential for duplication of reporting and also inconsistent reporting across different reporting regimes.
- If Australia does proceed to establish a regime based on the Exposure Draft, the Australian approach to public CbC reporting should be harmonised and aligned with existing OECD CbC reporting obligations (in respect of the data requirements), and should not extend to requiring the preparation of additional and/or different data compared to that required under existing obligations.
- The measures should clarify which specific data requirements of this public CbC reporting regime should align with the existing OECD CbC reporting regime (and guidance materials). Furthermore, the underlying source data requirements should be kept consistent with OECD CbC reporting requirements, to avoid the need for impacted groups to revisit and potentially reconfigure data gathering processes and systems.
- For jurisdictions other than Australia and specified jurisdictions, the Exposure Draft provides entities with the ability to provide data on these jurisdictions on either an aggregated basis or a jurisdiction-specific basis. However, the measures should also provide entities with the ability to choose to report some of these jurisdictions on a jurisdiction-specific basis whilst adopting an aggregated basis for the remaining "rest of the world" jurisdictions.
- If Treasury maintains that jurisdictional (disaggregated) reporting is required for certain listed jurisdictions (other than Australia), the list of countries specified by the Minister for such reporting should be aligned to the EU list of non-cooperative jurisdictions for tax purposes.
- While the Exposure Draft introduces a *de minimis* revenue threshold, the approach to defining that threshold could be simplified.
- The measures should clarify the scope of further applicable exemptions, including for non-Australian headquartered groups where the group consolidated revenue is below the OECD CbC reporting threshold in the headquarter jurisdiction, for government entities and entities with sensitive government information and where there are duplicative reporting regimes. Lastly, the measures should include provisions allowing for deferrals from lodgement in instances where information could be considered commercially sensitive (as with the EU Directive).

Each of these points are expanded upon below.

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1. Alignment with existing OECD CbC reporting requirements

1.1. Overview

Whilst the majority of the information to be reported under the Exposure Draft from paragraph 3DA(3)(a) to paragraph 3DA(3)(k) (and equivalent information listed at subsection 3DA(5)) broadly matches with existing OECD CbC reporting requirements, there are specific additional and/or different data requirements in the Exposure Draft, including the following proposed provisions:

Additional reporting requirements:

- paragraph 3DA(3)(j) – reasons for the difference between income tax accrued (current year) and the amount of income tax due if the income tax rate applicable in the jurisdiction were applied to profit or loss before income tax.

Inconsistencies with OECD CbC reporting for similar items by jurisdiction:

- paragraph 3DA(3)(b) – a description of main business activities.
- paragraph 3DA(3)(c) – the number of employees (on a full-time equivalent basis) as at the end of the reporting period,
- paragraph 3DA(3)(e) – revenue from related parties that are not tax residents of the jurisdiction.

Our principal submission in this regard is that the data disclosure requirements in the Exposure Draft should be fully aligned with the data disclosure requirements in the existing OECD CbC reporting requirements.

Comments on each of these items are provided below.

1.2. Additional data requirements

1.2.1. Section 3DA(3)(j) – Reasons for the difference between income tax accrued (current year) and the amount of tax due if the statutory rate was applied to PBT

As outlined in the ATO's corporate tax transparency report for the 2020-21 income year in respect of Australia, there are many deliberate features of a jurisdiction's tax system which can drive legitimate differences between an entity's effective tax rate in that jurisdiction as against the statutory rate.

Some of these features include, for example, prior year loss utilisation, the utilisation of incentives and tax expenditure programs, and the recognition of deferred tax assets and deferred tax liabilities.

As noted above, this information is not required to be reported as part of OECD CbC reporting. Requiring a statement of reasons on a jurisdiction-by-jurisdiction basis for the difference from the income tax due if the statutory rate applied is an additional compliance heavy exercise.

1.3. Inconsistencies with OECD CbC reporting for similar quantitative items by jurisdiction

1.3.1. Overall comments

Whilst there is considerable overlap between the reporting requirements in the Exposure Draft and the OECD CbC reporting requirements, there are various differences for some items, whether intended or unintended, in the specific information to be reported, including those noted below.

We reiterate our submission that any Australian based public CbC reporting is harmonised and aligned with OECD CbC reporting requirements. Any deviation creates additional costly and time consuming data gathering processes and system reconfigurations, the costs of which likely outweigh any benefit. Further, alignment between the two regimes would mean that there is less uncertainty regarding the requirements resulting in higher quality and consistent data, which is the expressed intent of a transparency measure.

1.3.2. Paragraph 3DA(3)(b) – a description of main business activities

The OECD CbC Report regime requires entities to categorise the main business activity(ies) carried out by each member in the relevant tax jurisdiction into one or more of thirteen specific categories (with a free text description also required in instances where the 'Other' category is indicated). This is in contrast to the approach in paragraph 3DA(1)(b) which requires entities to provide a *description* of main business activities, with this phrase also being different with that used in GRI 207 which states, "*primary activities* of the organisation".

We suggest that the Exposure Draft is aligned with the OECD CbC Reporting approach on this item – i.e., providing entities with the ability to categorise their operations consistently with existing OECD CbC reporting obligations, though still with the option of indicating 'Other' and providing further commentary, which will simplify this requirement and provide a basis for consistency with OECD CbC reporting.

We note that the EU Directive on public CbC reporting also includes a requirement to include a 'brief description of the nature of their activities'. Whilst specific guidance on the form of this requirement is not provided in the EU Directive, the EU Directive indicates that member states shall permit the required information to be reported on the basis of the instructions referred to in the Council Directive on non-public CbC reporting, which we understand is aligned with the OECD CbC reporting approach. In this regard, we understand that industry anticipates the EU Directive for public CbCR rules to follow the non-public OECD CbCR requirements, although this will not be confirmed until EU member states have implemented the directive within their local regulations.

With the stated intent of the Exposure Draft to promote transparency to enable public visibility, it is vital that stakeholders have certainty in interpreting published data points. Unless there is greater clarification of how taxpayers are to describe their activities, there is a risk that a disproportionate effort will be consumed in defining how an entity's activities are described and meaningful comparisons in the interests of transparency will not be enabled.

1.3.3. Paragraph 3DA(3)(e) – revenue from related parties that are not tax residents of the jurisdiction

The Exposure Draft at paragraph 3DA(3)(e) proposes the reporting of revenues from related parties that are not tax residents of the jurisdiction (of the entity). In contrast, OECD CbC reporting of related party revenues includes revenues from all other constituent entities, including constituent entities in the same jurisdiction.

Any differences in the proposed approach to reporting related party revenues under the Exposure Draft will create a significant additional compliance requirement for in-scope MNEs. This will likely necessitate a time consuming and costly reconfiguration of reporting systems and/or processes to capture and report this information on a jurisdiction basis.

In addition, requiring reporting that is different to the 'related party revenues' reporting requirement under OECD CbC reporting, appears to be in conflict with section 3DA(7), which requires that for the purposes of determining the effect of subsection (3), the information is to be identified so as to best achieve consistency with various OECD guidance materials referenced (please refer to section 3 below for our further commentary on inconsistencies between the guidance material).

1.3.4. Paragraph 3DA(3)(c) – the number of employees (on a full-time equivalent basis) as at the end of the reporting period

The Exposure Draft at paragraph 3DA(3)(c) and paragraph 3DA(5)(a) proposes the reporting of the number of employees on a full-time equivalent (FTE) basis as at the end of the income year. By contrast, OECD CbC reporting requires the reporting of the total number of employees on a FTE basis and provides options for reporting this data, including as of the year-end, on the basis of average employment levels for the year, or on any other basis consistently applied across tax jurisdictions and from year-to-year.

The 'number of employees' information being requested in the Exposure Draft may create a further incremental reporting requirement, depending on the approach in-scope MNEs are adopting for OECD CbC reporting purposes, with no apparent additional benefit in terms of the quality of the information to be reported or stated policy objectives.

As with the above comments in respect of related party revenue, this approach also appears at odds with the requirement under subsection 3DA(7) to identify the information so as to best achieve consistency with the relevant OECD guidance material referred to in paragraphs 3DA(7)(a) and (b). Please refer to section 3 below for our further commentary on inconsistencies between guidance material.

As noted above, if the intended outcome of transparency is to be achieved, consistency and certainty of understanding the data points is required.

2. Data to be used as the basis for reporting (consistency with other reporting requirements)

Paragraph 3DA(6)(a) of the Exposure Draft states that the information reported is to be based on "amounts as shown in the audited consolidated financial statements for the entity for the reporting period," with paragraph 3DA(6)(b) indicating that, "if audited consolidated financial statements for the entity for the reporting period have not been prepared—amounts that would be, on the assumptions that the entity were a listed company (within the meaning of section 26BC of the *Income Tax Assessment Act 1936*) and such statements were prepared, shown in those statements."

Notwithstanding this, the OECD CbC reporting guidance materials referred to at paragraph 3D(7)(a) provide various options for the source of data reported, which includes:

- consolidation reporting packages;
- separate entity statutory financial statements;
- regulatory financial statements; and
- internal management accounts.

To the extent that a reporting entity's OECD CbC report is based on data other than the group consolidated financial statements, the Exposure Draft approach creates significant additional data reporting requirements, and potential inconsistencies in the data reported by certain groups across similar CbC reporting requirements. As outlined above, we recommend that the reporting requirements under the Exposure Draft are aligned with the OECD CbC reporting requirements, including the data source requirements.

We note that the EU Directive on public CbC reporting does not, of itself, provide specific guidance on the financial data required to be used to address the reporting requirements. Whilst the specific application of the EU Directive is yet to be determined pending the issuance of member state guidance, we note that the EU Directive indicates that member states shall permit reporting on the basis of the EU non-public CbC reporting requirements, which we understand broadly aligns with the OECD approach referenced above.

3. Reference materials

Section 3DA(7) refers to the following documents as relevant for considering the data reporting requirements under the Exposure Draft:

- The Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, as approved by the Council of the Organisation for Economic Cooperation and Development and last amended on 7 January 2022 (per paragraph 3DA(7)(a)).
- Guidance on the Implementation of Country-by-Country Reporting: BEPS Action 13 (2022) of the OECD (per paragraph 3DA(7)(b)).
- Disclosures 207-1 and 207-4 of GRI 207: Tax (2019) of the Global Reporting Initiative's (GRI) Sustainability Reporting Standards (per paragraph 3DA(7)(c)).

In particular, section 3DA(7) notes that the required information is to be reported so as to best achieve consistency with the above mentioned documents, "to the extent that they are relevant".

We suggest that Treasury further clarifies which reporting requirements the reference materials are relevant for, in order to provide reporting entities with greater clarity regarding the specific data required to be reported, and the source of data to be reported. This is particularly relevant where there are inconsistencies between the OECD reference materials and GRI standards for certain data requirements.

4. Global revenue thresholds

The Exposure Draft imposes public reporting obligations on groups on the basis of the Australian specific concept of a global turnover threshold of AUD 1 billion. At the prevailing exchange rates, this threshold is significantly lower than the existing CbC threshold in many other jurisdictions.

In the absence of any modification, the proposed measures have the potential to impose a public CbC reporting obligation on groups which are not currently required to prepare an OECD CbC Report under the rules in their home jurisdictions. For example, AUD 1 billion is equivalent to approximately EUR 600 million, whereas the relevant threshold in European jurisdictions is EUR 750 million.

Currently, the ATO exercises a general discretion to provide an exemption from the Subdivision 815-E requirement to provide a CbC report where the group revenue exceeds AUD 1 billion but falls below the relevant threshold in the parent jurisdiction.

We do not consider that dealing with this mismatch should be a matter left to the discretion of the Commissioner. Rather, we recommend that for non-Australian headquartered groups, the proposed measures should only apply where such a group exceeds the relevant OECD CbC reporting threshold in the parent jurisdiction.

5. Jurisdictional reporting and jurisdictional aggregation

The Exposure Draft proposes:

- Australia and specified countries: jurisdiction-specific reporting for Australia and each jurisdiction specified in a determination under subsection 3DA(1)(d) if the CbC reporting group operates in that jurisdiction.
- Rest of the world: For all other jurisdictions, the default approach is to aggregate figures relating to each matter, subject to Section 3DA(2) which provides for entities to apply jurisdiction-specific reporting "in respect of each jurisdiction." (i.e., including in respect of those jurisdictions for which it is not required to report jurisdiction

specific data), and notes that the publishing requirements in 3DA(1)(e) will be met where this approach is adopted.

In respect of the "rest of the world" disclosures, the Exposure Draft requires that all of these jurisdictions be reported either on an aggregated basis or a jurisdiction-specific basis, and does not contemplate being able to choose to report some of these jurisdictions on a jurisdictional-specific basis whilst adopting an aggregated basis for the remaining "rest of the world" jurisdictions.

We recommend that the drafting provides for entities to be able to elect to apply some combination of the above – i.e., report some non-specified jurisdictions on an aggregated basis and others on a jurisdiction-specific basis. This will allow groups with greater flexibility to align their reporting with similar measures (e.g., the EU CbC reporting Directive) that require, for example, the publication of jurisdiction-specific data for each relevant European jurisdictions. This would facilitate greater alignment with other reporting obligations.

The proposed Exposure Draft indicates that entities will be required to provide information for certain jurisdictions specified by the Minister under section 3DA(4). Paragraph 1.26 of the Draft EM indicates that these jurisdictions, "may be those that are associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities." Notwithstanding this point, we submit that the Exposure Draft be aligned to the EU's listing criteria which are based on "tax transparency, fair taxation and measures against base erosion and profit shifting". This list is often updated to address changing tax landscapes and recognises that jurisdictions evolve over time. The list is also developed in global forums such as the Global Forum on transparency and exchange of information, the forum on harmful tax practices and the inclusive framework. Therefore, reliance upon the EU list ensures that there is a considered and principled basis for inclusion of these countries.

6. De minimis exemption

Paragraph 3D(1)(e) of the Exposure Draft indicates that a CbC reporting entity is only within the scope of the rules where the entity's aggregated turnover for the income year includes one or more amounts of income from an Australian source and the sum of those amounts is AUD 10 million or more. We further note that the EU Directive on public CbC reporting includes an assessment threshold, which requires subsidiaries of non-EU parented groups to exceed two out of three of the following criteria to fall within the scope of the rules:

- EUR 5 million balance sheet total
- EUR 10 million net revenue; and /or
- 50 average number of employees during the fiscal year.

Given Treasury's stated intent of better aligning the proposed measures with the EU Directive, we suggest that Treasury consider expanding the de minimis exemption thresholds to include additional balance sheet and employee thresholds to better align with the EU Directive approach.

7. Publishing per section 3D(3)

Section 3D(3) indicates that entities (to which the section applies) must publish the required information by way of giving a document containing the information to the Commissioner in the approved form. This is similar to the existing filing requirement and mechanism for the OECD CbC Report under paragraph 815-355(1), albeit in practice this is typically satisfied by way of the Australian taxpayer notifying the ATO that the CbC reporting parent filed the OECD CbC Report in their local jurisdiction, after which the ATO can access this data under either the CbC Multilateral Competent Authority Agreement (CbC MCAA) or a bilateral competent authority agreement.

It is not clear from the Exposure Draft how Treasury intends to enable a foreign entity to satisfy the reporting obligations proposed under the Exposure Draft (e.g., whether a surrogate filing mechanism will be introduced to enable an Australian member of the CbC reporting group to make the filing on the parent entity's behalf). We submit that the proposed filing process be further clarified by Treasury.

Lastly, unlike the OECD CbC Report, the Exposure Draft does not provide entities with the option to provide additional commentary (i.e., outside of the description of the CbC reporting group's approach to tax and reasons for the difference between income tax accrued and income tax due if statutory rate applied to profit before tax for relevant jurisdictions) on any of the specific information to be disclosed in the Public CbC report. Entities may consider such commentary to be important in providing context for some of the information being published. We therefore recommend that the Exposure Draft be amended to allow for such information to be provided, and/or for the ATO to provide entities with the ability to provide this information.

8. Exemptions from disclosure

We acknowledge that subsections 3DB(4) through (7) of the Exposure Draft provide for certain exemptions from the publication of information which can be granted by the Commissioner or by regulation. We further note that paragraph 1.19 of the Draft EM contemplates that an exemption may be granted to a 'government related entity' which is subject to alternative disclosure or accountability regimes, and this is reflected in subsection 3D(5) of the Exposure Draft. The meaning of 'government related entity' for the purposes of the Exposure Draft refers to the meaning of that term contained in the *A New Tax System (Goods and Services Tax) Act 1999*, which appears to be ultimately limited to Australian government related entities.

On the other hand, the broad scope of the proposed measures means they have potential prima facie application to, for example, certain foreign government related entities which are unlike the corporate ultimate parent entity of a multinational business.

We recommend that careful consideration be given to whether requiring foreign government related entities to disclose the data listed in the Exposure Draft is consistent with the principles of international comity.

Further, entities which contract with government related entities (whether domestic or foreign) in certain industries, such as defence, should also have a basis to be exempt from the public disclosure of data to the extent the data provides material insights into its relevant operations and sensitive data.

We recommend that Treasury considers clarifying the applicable exemptions in these circumstances, and also considers further aligning with the EU Directive, which provides for:

- Exemptions where there are duplicative reporting regimes (e.g., due to public CbC reporting for credit/investment firms under EU Capital Requirement Directive IV)
- Deferral of reporting for 5 years for commercially sensitive information.