Country-by-Country Reporting Exposure Draft

KPMG submission

KPMG Australia, March 2024

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Executive summary

Our submission emphasises the necessity of global consistency in tax transparency reporting. While the revised ED aligns with EU and OECD standards to a commendable extent, further coordination is imperative to prevent unnecessary compliance burdens and ensure uniformity across jurisdictions.

We appreciate the efforts made since the Exposure Draft (ED) issued in April 2023 to harmonise Australia's public Country-by-Country Reporting (CbCR) rules with global standards, notably bringing it to closer alignment with EU Public Country-by-Country Reporting Directive (EU public CbCR)[1] and OECD CbCR guidelines[2]. However, further alignment would be of benefit and reduce any undue compliance burdens on Multinational Enterprises (MNEs). Our recommendations aim to further enhance alignment, reduce compliance costs, and foster a global standard for tax transparency reporting.

In our submission, we recommend Australia's proposals closely mirror the EU public CbCR framework as a minimum standard, including linking the disaggregated reporting requirements with the EU non-cooperative and grey lists. The European Commission's rigorous analysis in developing their public CbCR framework, considering competitiveness and misinterpretation risks, in our opinion, renders it a robust model. Moreover, granting MNEs the option to disclose additional information beyond the minimum standard to align with existing OECD CbCR or GRI-207 reporting ensures flexibility and reduces compliance costs while promoting transparency.

Further work is also recommended to ensure the complex legal and practical considerations that arise regarding the reporting responsibility, in particular for foreign headquartered groups are fully assessed.

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[1] Council Directive (EU) 2021/2101, amending the Accounting Directive 2013/34/EU
[2] Action 13 of the OECD's BEPS (Base Erosion and Profit Shifting) Action Plan regarding Country-by-Country reporting and transfer pricing documentation.

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Background

About KPMG

KPMG is a global organisation of independent professional firms, providing a full range of services to organisations across a wide range of industries, governments and not-for-profit sectors. We operate in 146 countries and territories and have more than 227,000 people working in member firms around the world. In Australia, KPMG has a long tradition of professionalism and integrity combined with our dynamic approach to advising clients in a digital-driven world.

Our commitment to tax transparency

KPMG has a responsible approach to tax, strong governance and policies and are committed to transparency around tax. KPMG has a global policy to set the standard and expectations around member firm and partner tax affairs. There are risk management practices in place to ensure that tax affairs have been conducted in accordance with the relevant local laws and regulations and in harmony with global tax practices.

KPMG discloses the taxes we pay in our annual Impact Report and we are supportive of the development of a consistent framework that builds on this to further enhance tax transparency for firms.

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Section 1:
KPMG recommendations

RECOMMENDATION 1:

Australia should seek to align with EU public CbCR as closely as possible in the design of the minimum standard for its own public CbCR rules. When designing the EU public CbCR rules, the European Commission (EC) undertook a rigorous analysis of which elements of OECD CbCR were appropriate to make public, including relevance to its objectives, competitiveness risks and misinterpretation risks. MNE groups should be given the option to disclose further information above the minimum standard to align with either their existing OECD CbCR or GRI-207 reporting.

RECOMMENDATION 2:

We welcome the changes made since the April 2023 ED to better align the data requirements with EU public CbCR and the OECD CbCR requirements, as any deviations from existing standards can give rise to a disproportionate compliance burden. However, there remain some aspects where the requirements depart, and which should be aligned. These include:

- Confirmation that financial statements other than audited consolidated financial statements may be used to prepare the Australian public CbC reporting disclosures; and
- Removal of the requirement to split revenue disclosures between resident and non-resident related parties.

Treasury should consider removing disclosure of the book value of tangible assets in line with EU public CbCR. This was excluded by the European Commission (EC) in the development of the EU public CbCR Directive due to competitiveness concerns.

Similarly, Treasury should consider removal of the approach to tax and reconciliation of book to tax differences from the minimum standard given the additional compliance burden it would impose as these are not included in OECD CbCR and EU public CbCR. However, both disclosures could be left open to groups to include as an optional disclosure to better explain their tax profile in a jurisdiction.

Ideally, in the long run, compliance requirements for public CbC should be coordinated globally between governments and tax authorities to avoid an excessive burden on MNEs.

RECOMMENDATION 3:

Materiality thresholds for jurisdictional data disclosure and correction of errors need clarification to ensure consistency and mitigate the compliance burden.

RECOMMENDATION 4:

The specified countries list for disaggregated reporting should align with the list of EU non-cooperative jurisdictions (Annex I) and state of play with respect to commitments taken by cooperative jurisdictions to implement tax good governance principles (Annex II – so called “grey list).

The list should be made by reference to the EU lists to ensure it is automatically updated as the EU lists are revised.

RECOMMENDATION 5:

Australia's public CbC reporting should align with OECD guidelines to ensure appropriate use of information.

Clear safeguards and guidance are needed for using and interpreting CbC reports.

The wider tax transparency and related ESG agenda needs to be reviewed including the Board of Taxation’s voluntary tax transparency code to ensure it continues to meet community expectations.

RECOMMENDATION 6:

Clarification is needed regarding the responsibilities and legal framework surrounding CbC reporting obligations, especially for foreign-headquartered MNEs.

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RECOMMENDATION 7:

Responsibilities for reporting CbC information should be clearly defined to enhance compliance, drawing lessons from the EU's structured approach.

RECOMMENDATION 8:

Clarification is needed on whether it is intended that wholly domestic Australian groups are subject to public CbCR reporting. If they are not, we recommend revisions to the ED to exclude them rather than reliance on the Commissioner issuing a legislative instrument to exclude them or issuing a notice in writing.

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Section 2:
KPMG insights

The need for global consistency for tax transparency reporting

We welcome the changes made since the April 2023 ED to better align the data requirements with EU public CbCR and the OECD CbCR requirements, allow for aggregation of data for non-specified jurisdictions and to introduce a de minimis threshold for MNE groups with a small Australian presence.

With a global trend towards increased tax transparency, it is important for Australia to be particularly mindful of the need for global consistency in this area. Even minor deviations from other global standards can cause a disproportionate compliance burden for MNE groups. In this regard, the revised ED has come a long way towards greater alignment with other global tax reporting standards, but there remain some areas that require greater clarification or alignment, as outlined later in our submission.

As an overarching statement, ideally there should be a level of global co-ordination for tax transparency reporting to ensure in-scope MNEs will not be excessively and unreasonably burdened to satisfy multiple sets of requirements as different countries bring in local rules, which can outweigh the benefits from the improved tax transparency and corporate accountability.

Until there is global consistency in public CbC, the immediate question for Australian policy makers is which global standard should we seek to align to.

Moving globally towards best practice tax transparency is a journey, and one that needs to be weighed against the compliance burden imposed on in scope MNE groups and risks of misinterpretation of data by the public.

In our view, Australia should seek to align with EU public CbCR as closely as possible in the design of the minimum standard for its own public CbCR rules. When designing the EU public CbCR rules, the European Commission (EC) went through a rigorous analysis of which elements of OECD CbCR were appropriate to make public, including relevance to its objectives, competitiveness risks and misinterpretation risks. The EU allows MNEs the option to report based on the OECD CbCR instructions (and therefore choose their source of data).

If Australia adopted this approach, it could then give MNE groups the option to disclose further information above and beyond the minimum standard, for instance, to align with either their existing OECD CbCR or GRI-207 reporting. This minimum standard approach would achieve a number of the global consistency and reduced compliance burden objectives but allows those groups who are further along the path to best practice tax transparency to go further than the minimum standard.

If it is found that after a sufficient period of implementation that this scaled down minimum standard approach is not sufficiently meeting Australia's tax transparency objectives or global transparency has further evolved, the disclosures requested can be expanded in later years. This will give time for those groups that are newer to tax transparency reporting more time to adjust and get systems in place. A similar approach has been taken in the EU (refer to Article 48h of EU Directive 2021/2101/EU).

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Departures from existing global standards

LEVERAGING EXISTING CBCR DATA SOURCES TO REDUCE COMPLIANCE COSTS

The existing confidential (OECD) CbC reporting requirements under Subdivision 815-E of the *Income Tax Assessment Act 1997* (Subdivision 815-E) and Australia's new public CbC proposals will continue to operate in parallel. Many affected in-scope MNE groups will also soon be required to prepare EU public CbC reports. As such, it will be critical to ensure that these reporting requirements align where possible to reduce compliance costs. It would be a peculiar outcome if information collated for a CbC report prepared for the purposes of Subdivision 815-E could not be used without amendment to prepare the report for public CbC purposes.

In this regard, we support the comment in the EM (at paragraph 1.31) that refers to OECD CbC reporting guidance in interpreting the required disclosures of the ED to reduce the compliance burden on entities. However, the ED and EM then counteracts this in some respects by including some requirements that would appear to depart from OECD CbCR guidance.

To remedy this, we recommend the removal of the specific requirements that depart from the OECD CbCR guidance, which are discussed further below. Further, for the avoidance of doubt it should be made clear in the legislation or EM that to the extent that public CbC and OECD CbCR or EU public CbCR information requirements overlap, the information currently prepared for OECD CbCR or EU public CbCR can be used.

DETERMINATION OF WHICH FINANCIAL STATEMENTS TO USE

As an example of where there is a potential departure from the OECD CbCR and EU CbCR guidance is the financial statements that may be used to source the data to be disclosed. Under section 3DA(6), the amounts published must be based from amounts 'as shown in' the audited consolidated financial statements where such statements have been prepared.

As a result, the basis of preparation of the public CBC under the ED is not fully consistent with that set out in the existing OECD requirements on CbCR (which is also the basis used for EU public CbCR for MNEs that choose to report under the existing OECD requirements).

The EU public CbCR Directive (i.e., EU Directive 2021/2101/EU) allows MNEs to follow the existing CbCR rules (i.e., Council Directive 2011/16/EU – see reference in Article 48c, paragraph 3 of EU Directive 2021/2101/EU) when it comes to the basis of preparation of the report, which in turn are fully aligned with the OECD requirements:

"The Reporting MNE should consistently use the same source of data from year to year in completing the template. The Reporting MNE may choose to use data from its consolidation reporting packages, from separate entity statutory financial statements, regulatory financial statements, or internal management accounts. It is not necessary to reconcile the revenue, profit and tax reporting in the template to the consolidated financial statements." (see Section III, Parts B paragraph 4, of Annex III to Council Directive 2011/16/EU)

A similar statement is made by the Australian Taxation Office (ATO) in its guidance on CbCR reporting:
"The amounts reported in the CBC **report are not required to reconcile or be reconciled to the amounts** in the global financial statements for the group.

The reporting entity may use data from its consolidation reporting packages, from the statutory financial statements of separate entities, regulatory financial statements, internal management accounts or any combination of these sources…

The same sources of data should be used **consistently from year to year**. Where circumstances necessitate a change in data source, the change, the reasons for it and its consequences should be explained."

The approach proposed under the ED mandates that the amounts to be published by the MNE group must be based on amounts as shown in its audited consolidated financial statements if such financial statements have been prepared,

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which may be interpreted to be more restrictive than that adopted by the EU and the OECD.

Further, it is worthwhile to note that for the purpose of applying the Transitional CbCR Safe Harbour rules under Pillar Two, the Qualified Financial Statement requirements on the source of information also permit not only the use of consolidated financial statements but also the financial statements of each Constituent Entity with either an Acceptable Financial Accounting Standard or an Authorised Financial Accounting Standard so long as the information contained in such statements is maintained based on that accounting standard and it is reliable.

For MNE groups that have been sourcing data from separate entity statutory financial statements or allowable sources other than the consolidated financial statements, this proposal would mean that a significant amount of time, effort and resources would have to be invested to meet Australia's new CbCR proposals.

The EM (at paragraph 1.34) erroneously states that the requirement that the selected tax information be sourced from audited consolidated financial statements is *consistent with the EU Directive on public CbC reporting*. As noted above, the EU Directive allows Member States the option to report the CbCR information on the basis of the OECD guidance, including from accounts other than audited consolidated financial statements. We recommend the ED and EM be amended to reflect this option.

As well as broadening out the types of accounts that may be used to prepare the disclosures, we also suggest that the current wording in s3DA(6)(a) of "as shown in" be replaced with "reflected in" or other similar wording given individual jurisdictional level data would not typically appear in consolidated financial statements.

INCONSISTENCIES IN THE SPLIT OF THE DISCLOSURE OF REVENUES

Under the proposed measures, there is a requirement to disclose both "revenue from unrelated parties" and "revenue from related parties that are not tax residents of the jurisdiction".

In contrast, OECD CbCR requires disclosure of "related party revenues", "unrelated party revenues" and "total revenues". EU public CbCR requires disclosure of total revenues only.

The EC prepared an *impact assessment* report*, Commission Staff Working Document Impact Assessment assessing the potential for further transparency on income tax information* (EC impact assessment) in 2016 set out the reasons for departing from the OECD CbCR and requiring disclosure of total revenues only. Annex K of the EC impact assessment states:
"disclosing separately the turnover with non-related parties convey high competitiveness and misinterpretation risks as this would uncover to e.g. competitors information inherently connected to a group's structures and affairs, whilst the public at large might not understand the concept and even be misled by the complexity of different types of turnover. Besides, to analyse correctly those figures, one needs typically to determine which entities of a group did business among themselves, something that only an authority with forensic capabilities, such as a tax administration, would be able to perform. For these reasons, whereas the OECD BEPS 13 model requires the confidential submission to tax authorities of the turnover with related parties, turnover with third parties, and the total, only the total turnover of a group should be retained for disclosure in a public CBCR. Furthermore, Intra-group turnover is not a mandatory disclosure in the financial statements, contrary to all other information to be disclosed in a BEPS CBCR. Disclosing the split turnover may be seen by many (OECD, third countries, and companies) as a breach of the G20 consensus on confidentiality."

The requirement to split revenues in a different way for Australia's public CbC requirements could add a significant compliance burden for many groups. Although this data may be collated for some jurisdictions for other reporting purposes, this will not be the case for all jurisdictions and there may be a materiality threshold on existing data collation for related party revenues with foreign resident jurisdictions.

We recommend that total revenues only are disclosed similar to EU public CbCR. In the alternative, it could be replaced with disclosure of "related party revenues", "unrelated party revenues" in line with OECD CbCR.

BOOK VALUE OF TANGIBLE ASSETS

The category of "book value of tangible assets at the end of the reporting period of tangible assets, other than cash and cash equivalents" (s3DA(3)(g)) required under the Australian proposals is required under OECD CbC but is not required to be disclosed under the EU public CbCR.

The EC *impact assessment* explained why certain items such as 'tangible assets' were ultimately not included for public disclosure in

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the EU Directive. The reasons for the exclusion of 'tangible asset' are set out in Annex K of the EU's impact assessment report:

"The disclosure of assets poses nevertheless **high risks to competitiveness**. Combined with other information (such as the number of employees), the amount of assets can provide competitors with key information on strategic decisions pertaining to investment and the profitability of MNEs. For these reasons, the value of assets is not retained for a public CBCR."

Thus, we recommend disclosure of this item be removed from the minimum compliance standard but MNEs should be provided a choice to optionally disclose this item.

ADDITIONAL DISCLOSURE ITEMS FROM GRI-207

Under the ED, there are other disclosures required for public disclosure under the Australian proposals that are consistent with GRI-207 but inconsistent with the EU and/or OECD CbC reporting obligations. These are discussed below.

It is worthwhile to also note that the de minimis threshold of A$10 million is relatively low, representing only 1 percent of group revenue for a MNE group with an annual global revenue of A$1 billion. This would imply that many MNE groups with a relatively small presence in Australia would still be subject to the Australian public CbCR requirements.

Any data requirements beyond the EU or OECD rules would create further administrative burden for MNE groups that do not have obligation to provide such details for their existing CbCR. The in-scope MNE groups may have to revamp their data collection or reporting process in order to collect the additional data or analysis required, not only for operations in Australia, but also for those located in other jurisdictions that do not impose such requirements. The additional amount of effort and resources required by these MNE groups in meeting the additional disclosure requirements would be disproportionate for a group with relatively small presence in Australia.

However, it may be beneficial for some groups to have the opportunity explain their approach to tax and tax profile in a jurisdiction. Groups will be naturally incentivised to do so if their CbCR data could be misinterpreted by the public. As such, we recommend that these additional items not be a mandatory part of the minimum standard but instead MNEs should be provided a choice to optionally disclose.

RECONCILIATING ITEM ON A JURISDICTIONAL BASIS

One of the proposed disclosure items requires setting out the reasons for the difference between:

i. Income tax accrued (current year); and

ii. The amount of income tax due if the income tax rate applicable in the jurisdiction were applied to the amount of profit or loss before income tax ("reconciliating item")

We understand that this item is from GRI 207-4, which was intended to highlight "tax reliefs, allowances, incentives, or any special tax provisions where an entity benefits from preferential tax treatment" that may arise in the jurisdiction". However, this reconciliating item is not required under the EU public CbCR and the OECD CbCR and would add a significant compliance burden for the many groups that are not already preparing this for GRI-207.

Thus, we recommend disclosure of this item be removed from the minimum compliance standard but MNEs should be provided a choice to optionally disclose this item. As noted later in our submission, if this disclosure is retained, then materiality thresholds should be introduced to reduce the compliance burden.

APPROACH TO TAX

The proposed mandatory disclosure of an approach to tax in accordance with Global Reporting Initiative (GRI) 207-1 within these proposals does raise some practical and enforcement concerns.

Enforcing compliance with GRI 207-1 is likely to present significant challenges, particularly regarding the granularity and format of tax strategy disclosures. The EU public CbCR and the OECD CbC implementation guidance does not mandate the disclosure of an approach to tax.

Mandating the disclosure of tax strategies in accordance with GRI 207-1 introduces subjective elements, leading to varying interpretations and inconsistencies in reporting. For example, GRI 207-1 a.iv. requires the disclosure of "how the approach to tax is linked to the business and sustainable development strategies of the organization.", which reflects the ESG focus of GRI but would go beyond what should be expected for public CbCR.

In light of these challenges and given the variety of situations and needs, we recommend against mandating the disclosure of tax strategies in accordance with GRI 207-1 and instead allowing MNEs to voluntary disclose their approach to

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tax. Alternatively, if the disclosure of an approach to tax is to be mandated in Australia, then a minimum compliance standard of the more objective disclosures should be adopted taking into account the core elements of GRI 207 in the development of tax strategies including: the removal of how the approach to tax is lined to sustainable development strategies of the organisation but, for example, the inclusion of a brief description of the MNE's tax governance and control framework. We are happy to further consult on further details around this element.

If retained, guidance on this requirement should also give clarity on the level of detail required as a minimum standard, as it could be interpreted as anything from a short paragraph to a lengthy multi-page report.

MATERIALITY

The ED and EM lacks clarity regarding whether a materiality threshold applies to the data required to be disclosed on a jurisdictional basis. Moreover, the ED mandates that if an entity becomes aware of a "material error," it "must" publish information to correct the error (see s3DB(1) of the ED). It can be argued that if the information is sourced from audited consolidated financial statements, materiality from those accounts could apply at a jurisdictional level. Consequently, if a MNE has a significant materiality threshold at a consolidated level, and this threshold applies at a jurisdictional level, it could lead to non-disclosure of specific country information or exemption from the obligation to correct an error if it is not deemed "material." However, Australian tax legislation traditionally does not consider materiality as relevant. Therefore, the question arises whether MNEs need to disclose jurisdictional data at a granular level disregarding any materiality levels that may apply for financial reporting purposes.

Key considerations regarding this issue include:

- There may exist a materiality threshold that applies in a set of standalone audited financial statements of an entity in a particular jurisdiction.
- The OECD Transfer Pricing Documentation and Country-by-Country Reporting Action 13: 2015 Final Report sets out materiality guidance in Section D.3. It discusses the following:

"materiality thresholds that take into account the size and the nature of the local economy, the importance of the MNE group in that economy, and the size and nature of local operating entities, in addition to the overall size and nature of the MNE group. Measures of materiality may be considered in relative terms (e.g. transactions not exceeding a percentage of revenue or a percentage of cost measure) or in absolute amount terms (e.g. transactions not exceeding a certain fixed amount). Individual countries should establish their own materiality standards for local file purposes, based on local conditions. The materiality standards should be objective standards that are commonly understood and accepted in commercial practice. See paragraph 18 for the materiality standards applicable in completing the master file."

- The recent US FASB Accounting Standards Update on improvements to income tax disclosure adopts a 5% threshold test (e.g., income taxes paid net of refunds received in respect of an individual jurisdiction are disclosed when 5% or more of the total income taxes paid net of refunds received) unless the amount is immaterial for financial reporting purposes.
- *A*s a practical consideration, in the absence of guidance on materiality and given the penalties involved, taxpayers may adopt a conservative approach and seek to correct errors post-public release even for small errors (which further increases the compliance burden). Clarification is recommended to confirm which entity has responsibility for identifying and correcting errors.
- It would not be uncommon for errors to arise due to data issues during the extraction of numbers from financial statement information and populating them into the disclosure information (manual processes and mapping issues). Additionally, errors could occur if the regulator or standard-setting body, such as the GRI, changes its interpretation on a particular matter. Further guidance is required on what constitutes an 'error' for the purposes of s3DB(1).

Given the significant penalties for failing to publish information on time (including the correction of errors), we recommend a period of amnesty for penalties as MNE groups adjust to these new requirements.

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SPECIFIED JURISDICTIONS LIST

Under the minimum compliance approach under the ED for public CbC disclosure, the required information of 41 specified jurisdictions and Australia will need to be disaggregated for public disclosure.

The EM to the draft determination, *Taxation Administration (Country by Country Reporting Jurisdictions) Determination 2024* provides that the jurisdictions specified in that draft determination are those that are typically associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities. It also notes that these jurisdictions align with the Commissioner of Taxation's International Dealings Schedule (IDS) specified countries or jurisdictions list, excluding jurisdictions in the EU which are Cyprus, Ireland, Luxembourg and the Netherlands (as these may be subject to tax information disclosures under the EU's public CbCR regime already).

For the remaining countries listed for disaggregated reporting under Australia's proposed public CbC rules, the rationale for public disclosure for a number of those jurisdictions is unclear. Whilst we appreciate that Australia's public CbC rules require some level of disaggregation to make the report meaningful, we do not consider that the list of specified countries or jurisdictions from the IDS is the appropriate list to use. Given the significant changes in the global tax landscape in recent years, this list is already out of date in terms of its usefulness of identifying base erosion or profit shifting risks.

In particular, we question the inclusion of Switzerland, Singapore and Hong Kong on the list of specified jurisdictions. Australia has a Double Tax Agreement with both Switzerland and Singapore. Moreover, Switzerland, Singapore and Hong Kong have all committed to or are in the process of implementing the OECD's Pillar Two global minimum tax rules, including a domestic minimum tax of 15 percent (Switzerland from 2024 or 2025, and Singapore and Hong Kong from 2025). Therefore, as these jurisdictions are committed to implement minimum 15 percent tax rate, Treasury should consider whether it is still appropriate to retain these countries on Australia's specified list of jurisdictions for public disclosure.

The EU public CbCR disaggregation requirements require disclosure at a jurisdictional level for EU member states and jurisdictions listed on the EU non-cooperative jurisdictions and grey list (for jurisdictions that have been on that list for a minimum of two years). This list was updated on 20 February 2024, and it is noteworthy that a number of jurisdictions, including Switzerland and Hong Kong, have dropped from the list over the last few years as they have implemented reforms to meet the required standards set by the EU. There are now **12** on the EU non-cooperative list and **10** on the EU grey list. See Appendix A for an updated listed of EU non-cooperative and grey listed jurisdictions.

Australia's specified listing of jurisdictions for disaggregated reporting extends beyond this list. We would submit that the jurisdictions listed on the EU non-cooperative jurisdictions and grey list (for jurisdictions that have been on that list for a minimum of two years) would be more appropriate to use as the basis of the "specified jurisdictions" list. This would align with the EU public CbCR disaggregation requirements, which would further reduce the compliance burden associated with this measure and would ensure that jurisdictions that have reformed to meet EU standards are not penalised or unfairly labelled as "non-cooperative" or "tax haven" jurisdictions.

Rather than listing the jurisdictions individually in the *Taxation Administration (Country by Country Reporting Jurisdictions) Determination*, we would suggest making direct reference to the EU lists to ensure that the jurisdictions requiring disaggregated reporting under Australia's public CbC requirements can be kept current.

INTERNATIONAL OBLIGATIONS AND USE OF CBCR INFORMATION

It is important that Australia's new public CbC reporting proposal aligns to our international obligations, particularly in light of the OECD Action 13 Country-by-Country Reporting guidance. The OECD's guidance, in line with Australian guidance, emphasises the importance of maintaining confidentiality while facilitating the exchange of tax-related information effectively.

It is essential to note that the ability of jurisdictions to obtain and utilise CbC reports under OECD BEPS Action 13 is contingent upon their appropriate use, as outlined in the *OECD Guidance on the appropriate use of information contained in Country-by-Country reports* (September 2017). This appropriate use encompasses high-level transfer pricing risk assessment, the evaluation of other base erosion and profit shifting-related risks, and, where applicable, economic and statistical analysis.

With the transition to public disclosure of CbCR information under Australia's proposals, there

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arises a heightened risk of misinterpretation of the data as the information becomes accessible beyond revenue authorities.

While adopting a minimum compliance standard approach of disclosing only specific jurisdictions of concern on a disaggregated basis and aggregating the rest of the world's data can mitigate some public disclosure risks noted above, it is imperative for Treasury to engage with the OECD to ensure compliance and incorporate comprehensive commentary in the EM outlining Australia's adherence to international obligations in introducing its public CbC proposals. There were similar considerations in the development of the EU public CbCR (see section 6.1.1 Potential impacts of further corporate tax transparency on the multilateral approach of the G20 and the OECD in the EC impact assessment).

To enhance the usefulness of the CbC public data, we also recommend the establishment of clear and necessary safeguards on the appropriate use and interpretation in the draft legislation. For instance, the ATO's role should not just be limited to facilitating the publication of the CbC reports (as intended under the current ED). The ATO should work with relevant stakeholders to design and publish detailed accompanying guidance that would help the general public and other relevant stakeholders to:

i. use the CbC reports appropriately; and

ii. properly contextualise the information in a CbC report so that all parties can apply a **common language** when it comes to interpreting the information.

We wish to highlight that unlike the case of Australia's Voluntary Tax Transparency Code, the current draft legislation makes public CbC reporting mandatory for in-scope MNEs. It therefore warrants that the Australian government undertakes proportionately greater responsibilities in safeguarding against inappropriate use and misinterpretation of the CbC information beyond merely facilitating the publication of the CbC reports. In the development of these guidelines, it is important what is proposed is meaningful, proportionate and purposeful. In light of this and global developments, the wider tax transparency and related ESG agenda needs to be critically reviewed including the Board of Taxation's voluntary tax transparency code to determine that it continues to meet community expectations.

OBLIGATIONS IMPOSED ON THE CBC REPORTING PARENT

In the context of reporting CbC information in Australia, particularly concerning foreign-headquartered MNE groups, several complex considerations arise regarding the responsibility for compliance and the legal framework surrounding such obligations.

Our key points are set out below for further consideration and clarification by Treasury:

- **Extra-territorial issues:** The imposition of CbC reporting obligations on the "CbC reporting parent" raises potential challenges regarding extraterritoriality, this is of particular relevance when the parent entity is not an Australian resident. It necessitates a nuanced analysis of relevant Double Taxation Agreements, Tax Information Exchange Agreements, and the Convention on Mutual Administrative Assistance in Tax Matters to ascertain jurisdictional boundaries and exchange of information provisions. For some jurisdictions, publication of such data may come into conflict with local laws.

- **Imposition of reporting obligations**: Fundamental questions arise regarding whether laws imposing reporting obligations, albeit not directly related to taxation, fall within the purview of the Constitution's taxation provisions. This distinction is pivotal, particularly concerning reporting measures not directly linked to tax imposition.

- **Conflict of law issues**: An internal inconsistency emerges between the CbC reporting legislation, requiring public disclosure of certain taxpayer information, and Division 355 of Schedule 1 to the *Taxation Administration Act 1953*, which is designed to safeguard the confidentiality of taxpayer information. This incongruity necessitates careful consideration to ensure the new measures have regard to the overriding purpose of the secrecy provisions so as to ensure legislative coherence and effectiveness.

- **Effectiveness of the law**: The efficacy of CbC reporting laws hinges on entities' custody and control of information, especially in cases where jurisdictions lack corresponding requirements. Addressing these discrepancies requires a nuanced approach to ensure compliance without imposing undue burdens on entities

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operating across diverse regulatory landscapes.

Given the complexities surrounding the responsibility for reporting CbC information in Australia, particularly within foreign-headquartered MNE groups, we recommend that Treasury confirms the legal position in respect of the proposed policy deliberations of mandating public reporting.

PUBLICATION OF CBCR

Australia's current CbC proposals lack clarity regarding the entity responsible for reporting, contrasting with the approach implemented by the EU public CbCR. The EU's CbC reporting framework delineates clear responsibilities for reporting entities. However, the ED falls short in this aspect, hindering effective implementation and compliance particularly for foreign headquartered MNEs.

In the EU, reporting obligations are clearly defined based on the ultimate parent company's jurisdiction. For MNEs with EU-based parent companies, the responsibility lies with the EU parent, promoting accountability and centralised reporting. Conversely, for non-EU parented groups operating in the EU through qualifying subsidiaries and branches, each relevant EU subsidiary and branch is tasked with disclosing information on the group's global operations. This structured approach ensures comprehensive reporting while enabling subsidiaries and branches to fulfil their obligations effectively.

Furthermore, the EU framework includes provisions to address scenarios where subsidiaries or branches may lack access to requisite information at the group level. In such cases, subsidiaries or branches are empowered to request necessary data from the non-EU parent to fulfil their reporting obligations. Additionally, exemptions are provided for EU entities if the non-EU parent publishes the report on their website and designates an EU subsidiary or branch to file the report with the national commercial registry.

Australia's CbC reporting rules would benefit from adopting similar clarity and structure regarding reporting responsibilities. Establishing clear guidelines on reporting entities would enhance compliance with Australia's CbC proposals.

WHOLLY DOMESTIC AUSTRALIAN GROUPS SUBJECT TO PUBLIC CBCR OBLIGATIONS

As currently drafted, the revised ED could impose the new public CbCR obligations to groups solely operating within Australia without any global presence. It is not clear whether this is an intended outcome given the underlying objective of the public CbCR rules to provide greater transparency over potential base erosion and profit shifting between jurisdictions.

The proposed Section 3D applies to a "country by country reporting parent" that is a member of a "country by country reporting group". Under the definitions of these terms in the OECD CbC rules and guidance, there is no requirement for the group to operate in more than one jurisdiction. Instead, this requirement is brought in through the definition of "MNE Group" which means:

"any Group that (i) includes two or more enterprises the tax residence for which is in different jurisdictions, or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction, and (ii) is not an Excluded MNE Group." (refer to the OECD Transfer Pricing Documentation and Country-by-Country Reporting Action 13: 2015 Final Report)

Under the EU public CbCR, the reporting requirements do not apply to standalone undertakings or groups (including their branches) that are established or have their fixed place of business or permanent business activity in a single Member State.

Under Australia's current CbC rules, where the entity is an Australian CBC reporting parent, or a member of a group consolidated for accounting purposes with an Australian CBC reporting parent, where the group has no foreign operations (and no foreign operations means no constituent entity or permanent establishment outside Australia) the ATO can grant a "fast tracked exemption" to file one or more CbC statements (refer to Exemptions (including administrative relief) | (ato.gov.au)).

Given the intention of the Australian public CbC requirements, we would submit that the rules should not apply to wholly domestic groups.

Clarification is needed on whether this outcome is intended. If not, we recommend revisions to the ED to exclude them rather than reliance on the Commissioner issuing a legislative instrument to exclude them or issuing a notice in writing.

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Appendix 1: jurisdictions (Annex I) and state of play with respect to commitments taken by cooperative jurisdictions to implement tax good governance principles (Annex II – so called "grey list")

EU NON CO-OPERATIVE LIST

Anguilla
Antigua and Barbuda
American Samoa
Fiji
Guam
Palau
Panama
Russian Federation
Samoa
Trinidad and Tobago
US Virgin Islands
Vanuatu

EU GREY LIST

Armenia
Belize
British Virgin Islands
Costa Rica
Curaçao
Eswatini
Malaysia
Seychelles
Türkiye
Vietnam

Reference: Euro Tax Flash from EU Tax Centre - KPMG Global
Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purpose

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