The Tax Institute

19 March 2024

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

By email: MNETaxTransparency@treasury.gov.au

Dear Director,

Public country-by-country reporting – February 2024

The Tax Institute welcomes the opportunity to make a submission to the Treasury in respect of its consultation on:

- the exposure draft Treasury Laws Amendment Bill 2024: Multinational tax transparency - country by country reporting **(updated draft Bill**) and accompanying draft explanatory memorandum (**updated draft EM**); and
- the exposure draft Taxation Administration (Country by Country Reporting Jurisdictions) Determination 2024 (**draft determination**) and the draft explanatory statement (**draft ES**).

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

The Tax Institute is pleased to see that the updated draft Bill proposes some welcome amendments to the exposure draft legislation (**original draft Bill**) and accompanying explanatory materials (**original draft EM**) that were previously released by the Treasury for consultation in April 2023. These amendments include:

- the deferred start date of the reporting requirements to on or after 1 July 2024;
- closer alignment with the reporting requirements prescribed by the EU 2021/2101 reporting systems (**EU CbCR**).;
- the introduction of *de minimis* exclusion that exempts a country-by-country **(CbC)** reporting entity from its reporting obligations where the entity's Australian sourced aggregated turnover for the income year is less than $10 million;

- minimum compliance standard of CbC basis disclosures for Australia and 41 specified jurisdictions which include Singapore, Hong Kong and Switzerland, and on either a CbC basis or on an aggregated basis disclosure for the rest of the world. This is an improvement from the original draft Bill which had proposed mandating full disaggregated reporting; and
- the removal of certain additional disclosures such as related party expenses, a list of tangible assets, book value and list of intangible assets, and the effective tax rate disclosure.

Overall, The Tax Institute generally supports the updated draft Bill and updated draft EM. However, we note the following key unresolved issues that could be addressed either through legislation or ATO guidance.

- Aligning the Australian requirements more closely with global reporting standards, including the Organisation for Economic Co-operation and Development reporting system (**OECD CbCR**), is a positive step toward reducing the compliance burden, as mentioned in the updated draft EM. However, discrepancies in disclosure requirements between the draft Bill and other CbC reporting systems create challenges for taxpayers. The updated draft Bill should allow information from the OECD CbCR or EU CbCR to be used if it overlaps with Australia's proposals, easing the transition for affected entities.
- Singapore, Hong Kong and Switzerland should be removed from Part 2 - *Determination of country-by-country reporting jurisdictions* of the draft determination as there is no clear policy rationale for their inclusion. These jurisdictions are not part of the EU's non-cooperative jurisdictions list for tax purposes and have indicated that they are committed to implementing the Pillar 2 rules. We also note that Singapore and Switzerland have tax treaties with Australia.
- Clarity is needed on the administrative aspects of this proposed measure, regarding how to submit information to the Commissioner, what constitutes a material error etc., with proactive engagement from the ATO. Prompt and detailed guidance from the Commissioner will facilitate and support taxpayers' compliance with their reporting obligations.
- The *de minimis* exclusion is positive for entities with turnover below $10 million, but concerns arise about excluding entities with Australian-sourced income from related party transactions. Further guidance is needed regarding submitting information to the Commissioner, especially for foreign entities serving as CBC reporting parents.
- The Tax Transparency Code should be reviewed in light of this proposed measure to ensure consistency.
- Also, the Government should conduct a post-implementation review to address operational issues and technical amendments as they arise in practice. Real-time feedback and potential revisions within a year or two of the new rules coming into effect may be necessary.

Our detailed response and recommendations to further improve the updated draft Bill and updated draft EM are contained in **Appendix A**.

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

If you would like to discuss any of the above, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla, at (02) 8223 0058.

Yours faithfully,

Scott Treatt
Chief Executive Officer

Todd Want
President

APPENDIX A

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

Reporting thresholds and disclosure divergences compared with other CbC reporting regimes

Increased alignment with international reporting requirements is a welcome step.

We also acknowledge the comments provided in the updated draft EM (at paragraph 1.31) that the:

> inclusion of the OECD CbC reporting guidance is intended to reduce the compliance burden on entities as they are already familiar with its interpretation as it is used by these entities in meeting their existing obligations for confidential CbC reporting.

However, there are still some discrepancies in the disclosure requirements under the updated draft Bill compared to other mandatory CbC reporting systems such as the OECD CbCR and the EU CbCR. For example, as currently proposed under the updated draft Bill, there are additional requirements for public disclosure which go beyond the OECD CbCR and EU CbCR. These include the disclosures of:

- revenue from unrelated parties and revenue from related parties that are not tax residents of the jurisdiction. The OECD CbCR requires disclosures of related party revenues, unrelated party revenues and total revenues. The EU CbCR requires disclosures of total revenues only;
- the group's approach to tax or tax strategy; and
- explanations for differences 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 the amount of profit or loss before income tax.

These departures from the OECD CbCR and the EU CbCR impose an additional compliance burden on the taxpayers.

It is important for the legislation to explicitly state that if Australia's proposals align with the OECD CbCR or EU CbCR, the information already prepared for these frameworks can be used. This will assist to avoid a duplication of efforts on the part of taxpayers who are already required to report under these regimes.

Additionally, there may be cases where an entity meets the relatively low revenue threshold of A$1 billion as a CbC reporting parent (as defined in Subdivision 815-E of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**)) but does not meet the CBC reporting threshold in the parent company's jurisdiction. For example, the EU CbCR has a threshold of EUR 750 million, which is currently higher than A$1 billion. This means that there could be multinational corporations that are not required to report under the OECD CbCR or EU CbCR due to falling below the threshold but would still need to compile and prepare the relevant information solely to meet their Australian reporting obligations. If addressing this issue in the legislation is challenging, the ATO should consider granting annual exemptions taking into account material currency fluctuations, or at least allow a transitional period for any entities that become subject to the reporting requirement for the first time (under the proposed regulation-making power). An alternative approach would involve the ATO issuing guidance similar to that provided in Law Companion Ruling - *Subdivision 815-E of the Income Tax Assessment Act 1997: Country by country reporting* (**LCR 2015/3**), which addressed the issue of existing CbC reporting obligations under Subdivision 815-E of the

ITAA 1997. Such guidance would help alleviate the compliance burden associated with this particular situation.

List of Specified Countries in the draft determination

The Tax Institute is of the view that there is no clear policy rationale for the inclusion of Singapore, Hong Kong and Switzerland as part of the 41 specified jurisdictions in the draft determination. These jurisdictions are not part of the EU's list of non-cooperative jurisdictions for tax purposes, nor are they part of the EU grey list. The revised Annex I of the EU List (non-cooperative jurisdictions) now includes 12 jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, Fiji, Guam, Palau, Panama, Russia, Samoa, Trinidad and Tobago, the US Virgin Islands, and Vanuatu. Annex II of the EU List (grey list), which covers jurisdictions that have made sufficient commitments to reform their tax policies but remain subject to close monitoring while they are executing on these commitments includes 10 jurisdictions: Armenia, Belize, the British Virgin Islands, Costa Rica, Curaçao, Eswatini, Malaysia, Seychelles, Turkey, and Vietnam. Switzerland and Singapore have a double taxation agreement with Australia. Singapore, Hong Kong, and Switzerland have indicated that they are committed to implementing Pillar 2 rules. The Tax Institute is of the view that the list of specified jurisdictions in the draft determination should align with the EU list of non-cooperative jurisdictions for tax purposes.

Corrections

Subsection 3DB(1) of the draft Bill requires the reporting entity to inform the Commissioner of any 'material error' within 28 days of becoming aware of it. In other cases, the entity may choose to notify the Commissioner. More specific guidance is required to determine what constitutes a 'material error' in the report originally lodged. For example, it is not clear whether changes made to financial statements after an audit require notification of corrections, or if failing to report an error in one operational jurisdiction, such as inaccurately reporting employee numbers, would be considered significant or material. ATO guidance in this regard is necessary to ensure taxpayers do not incur potential penalties for inadvertently not reporting these errors.

De minimis exclusion

The introduction of the *de minimis* exclusion is a positive development as it reduces the compliance burden for entities with aggregated turnover that includes Australian-sourced income of less than $10 million. However, it appears that this exclusion may inadvertently not apply to entities whose only Australian-sourced income comes from related party transactions involving connected entities or affiliates (noting the exclusion from aggregated turnover in paragraph 328-115(3)(a) of the ITAA 1997). This result seems to be inconsistent with the intended purpose of the exclusion. For instance, if Australia serves as an intermediate or conduit hub for global operations, where products are sold from Australia to a connected offshore entity that then distributes them worldwide, the income generated by the Australian entity would be considered Australian-sourced ordinary income but would not be included in the aggregated turnover due to its derivation from a connected entity.

Information provided to the Commissioner

Guidance from the ATO regarding how to submit information to the Commissioner as specified in paragraph 3D(3)(b) of the draft Bill, including details on data format and any additional documentation required, like unique identification numbers for potential registration on the Government database is necessary to support taxpayers. Considerations also need to be given to the lodgement process of a foreign entity serving as the CbC reporting parent, especially if it otherwise has no other interactions with the ATO. This includes determining who is authorised to submit and make necessary declarations. For example, could an Australian entity or one with a permanent establishment in Australia lodge the information on behalf of the foreign parent entity?

In addition, the Commissioner must consider the software requirements, such as XML schema translation tools, necessary for lodgment purposes. Given the previous challenges in implementing the OECD CbCR and enforcing penalties for late submissions or non-compliance by foreign entities, it is necessary for the Commissioner to establish the essential infrastructure and promptly provide guidance to support taxpayers' compliance with their reporting obligations.

Exemptions

Subsections 3DB(5) and 3DB(6) of the updated draft Bill authorise the Commissioner to exempt an entity by way of a notice in writing from complying with subsection 3D(3). However, the legislation does not specify the criteria or parameters for granting such exemptions. We consider that detailed guidance on the parameters for granting an exemption in accordance with the updated draft Bill is required, and at the very least the exemption granted should be by way of a legislative instrument.

Tax Transparency Code

The Tax Transparency Code is a set of voluntary principles and basic requirements created by the Board of Taxation to guide medium and large businesses in disclosing their tax information to the public. The Tax Institute is of the view that these guidelines should be reviewed in light of the proposed mandatory public CbC measures to ensure better consistency and mitigate duplication of efforts.

Post-implementation review

Given the significant impact of this proposed measure, The Tax Institute emphasises the importance of the Government’s commitment to conducting a post-implementation review. Stakeholders have been engaged in providing timely feedback since the proposed changes were first announced. However, we recognise that the updated draft Bill once enacted may require clarifications and other technical amendments based on its operation in practice and as tax advisers start to apply the law to taxpayers’ circumstances. It would be preferable that such a post-implementation review be conducted in real time and in any case, within a year or two of the commencement of the new rules.