

By Electronic Delivery

June 8, 2023

The Hon Dr Jim Chalmers MP
Treasurer
House of Representatives
Parliament House
Canberra ACT 2600
Australia

RE: *Public Country-by-Country Reporting*

Dear Dr Chalmers,

The undersigned fund industry associations have substantial concerns with Australia's draft proposal to require multinational tax transparency through public country-by-country (CbC) reporting. Specifically, in summary, we are concerned that:

- the proposal fails its goal of fairly informing the public about a company's true tax position;
- the proposal's goal to increase transparency may not be achievable even if companies include an enormous amount of narrative to supplement the data provided;
- the proposal's expansive scope goes far beyond what other jurisdictions require and will result in confusing inconsistencies in how information is reported;
- Australia's commitment under BEPS to keep this information private is being violated and may undermine future global coordination;
- significant harm will be incurred by companies required to disclose highly sensitive commercial information to their competitors; and
- the proposal's Australia-specific requirements could mislead the public in many cases.

We strongly support the disclosure of information that promotes sound investment decisions and tax compliance. The current proposal, however, does not balance appropriately the desire for greater transparency to potential investors and the public with the legitimate business need for certain competitive information to remain confidential.

We recommend, as explained below, that the draft proposal be modified to:

- limit the proposal's extraterritorial effect by:
 - exempting non-resident parent MNEs with *de minimis* Australian operations; and
 - aggregating information for all non-Australian countries that are not tax havens;
- include a "comply or explain" mechanism to allow Australian subsidiaries of non-resident parent MNEs to be in compliance if they cannot obtain the required information;
- include a safeguard clause that would protect the competitive position of firms by allowing commercially sensitive information to remain confidential; and
- eliminate the extensive reporting that is not required anywhere else in the world by requiring reporting consistent with international norms and Pillar 2.

These recommendations will ensure that Australia remains an attractive market for doing business and investing capital. At a minimum, we strongly recommend that there be an extensive consultation period and extended implementation timeframe to mitigate these concerns. Moving forward with the proposal as drafted would weaken global cooperation, undermine tax certainty and stability, and run counter to Australia's stated position of welcoming foreign investment.¹

Background

The Australian proposal, if adopted, would be inconsistent with the international consensus as it would require *every* multinational entity (MNE) with *any* Australian activities to disclose publicly extensive information regarding *every* country in which it operates. This public CbC report would need to be accompanied by a statement on its approach to taxation.

Australia's proposal would go far beyond what was agreed in Action 13 of the OECD's Base Erosion and Profit Shifting (BEPS) project. Specifically, Australia and other countries agreed that CbC reports would be shared solely with tax authorities. CbC reports were intended only to be a tool for risk assessment by tax administrations.

Australia's proposal also would go far beyond what was agreed by the European Union after extensive consultation. The EU directive is limited to information already reported on the CbC reports, addresses extraterritorial concerns, and includes safeguards to protect the confidentiality of commercially sensitive information.

Material Presence should be Prerequisite

The Australian proposal would apply to MNEs with a *de minimis* presence in Australia; this disproportionate impact could cause some companies to abandon or avoid Australia. The EU, in contrast, does not subject a non-EU MNE to public CbC reporting until, among other things, an EU branch or subsidiary has turnover (revenue) of over 8 million Euros. We recommend a similar revenue threshold before non-resident parent companies are subject to Australia's public CbC reporting.

Expansive Scope of Information to be Reported

The Australian proposal would require reporting of detailed information that is not required to be disclosed publicly anywhere else in the world. Our scope concern has two components.

First, reportable information items would include revenue from third parties, revenue from related parties, expenses from transactions with related parties that are not tax residents of the jurisdiction, a list of tangible assets and their book value, and a list of intangible assets and their book value. Collecting this information for every country in which an MNE operates would

¹ Source: <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/increase-foreign-investment-fees-and-penalties>

impose burdens greatly exceeding any possible benefit to the public. We recommend that these new information items not be reportable.

Second, a non-resident headquartered company would be required to report detailed information about its non-Australian activities in every country in which it or a subsidiary operates. The EU directive, in contrast, limits jurisdiction-specific information to the 27 member states and tax haven jurisdictions. Information for all other jurisdictions is reported on an aggregated basis. The aggregation mitigates somewhat our concerns about disclosing commercially sensitive information. We recommend a similar aggregation approach for Australia.

Comply or Explain

Australia's public CbC proposal should include a "comply or explain" provision to address potential difficulties that will confront an Australian branch or subsidiary of a nonresident MNE. Specifically, such an Australian entity may not have access to confidential or sensitive business information for entities within the same MNE group that are operating outside Australia. We recommend that Australia adopt a "comply or explain" provision similar to the one in the EU directive; the EU provision requires an EU-resident subsidiary or branch of non-EU headquartered parent company to request the information required to comply with the public country-by-country reporting directive. If the information is not provided, however, the EU branch or subsidiary must publish a statement as to why some or all information is not available.

Safeguard Clause

Australia's public CbC proposal also should include a robust safeguard that will protect the competitive position of firms, especially privately held firms, that bring jobs to and invest capital in Australia. The EU recognized these competitiveness concerns and included a robust safeguard clause in its directive. Specifically, the EU allows commercially sensitive information, as determined by the relevant tax authorities, to be omitted from the public report.

Imposing public disclosure of a company's commercially sensitive information would enable the firm's competitors to reverse engineer its financials, business strategy, and operation model; its competitors, in turn, would have an unfair competitive advantage in pricing their products and services.

Absent a similar safeguard clause, MNEs operating in Australia would be at a significant disadvantage compared with their competitors that do not have an Australian presence and competitors that are not subject to broad public CbC disclosures. We strongly recommend that Australia provide similar safeguard provisions as in the EU's public CbC requirements.

International Norms and Consistency

The proposal's deviations from the OECD's Pillar 2 Model Rules, such as how to determine and deal with low-taxed income of an MNE group, also are concerning. A company could meet the threshold for paying the minimum tax under the Pillar 2 rules, but still be considered low-taxed under Australia's rules. Importantly, the proposal also would require an accelerated

implementation of Pillar 2 concepts much sooner than envisioned by the OECD/G20 and with little notice to comply. This undermines the OECD's goal for the two-pillar approach to discourage unilateral measures in favor of global cooperation and tax certainty.

Aiding public understanding

Finally, we are concerned that the proposals are likely to undermine the goals of public disclosure, because of situations in which the Australia-specific requirements could be misleading. Effective tax rate disclosures, as noted above, may create the misleading view that a company is low-taxed when additional tax is paid because of the Pillar 2 top up tax rules. The disclosure of the value of intangibles is also likely to be misleading as the book value of these intangibles may be zero for businesses that have generated these intangibles internally. More broadly, the Australia-specific disclosures are likely to be voluminous for many businesses and may be incomprehensible to anyone except a business' competitors.

* * *

The undersigned industry associations support Australia's desire to provide the public, including investors, with increased transparency. We believe that incorporating the recommendations discussed above would promote that goal while balancing the needs for business to safeguard commercially sensitive information and foster tax certainty.

With kind regards on behalf of the undersigned fund industry associations,

Patrick Pang
Managing Director and Head of Compliance and Tax
Asia Securities Industry & Financial Markets Association

Eugenie Shen
Managing Director, Head of Asset Management Group
Asia Securities Industry & Financial Markets Association

Arianna Immacolato
Director of Tax and Pensions
Assogestioni

Holger Sedlmaier
Head of Tax and Pensions
BVI Bundesverband Investment und Asset Management

António Frade Correia
Senior Tax Advisor
EFAMA - European Fund and Asset Management Association

Katie Sunderland
Associate General Counsel, Tax Law
ICI Global

Anshita Joshi
Head of Risk and Tax Unit
The Investment Association

Pat Lardner
Chief Executive
Irish Funds

Camille Thommes
Director General
Association of the Luxembourg Fund Industry (ALFI)

Jillien Flores
Executive Vice President, Head of Global Government Affairs
Managed Funds Association

Josh Wilsusen
Executive Vice President, Advocacy
SIFMA

William C. Thun
Managing Director and Associate General Counsel
SIFMA Asset Management Group

cc: Michael Quinlivan
Andrew Leigh