5 March 2024

Director
International Tax Branch
Corporate & International Tax Division
The Treasury
Langton Crescent
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Via email: MNETaxTransparency@treasury.gov.au

Dear Treasury

Public Country-by-Country Reporting

The Australian Financial Markets Association (**AFMA**) represents the interests of over 125 participants in Australia's financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. AFMA's members are the major providers of wholesale banking and financial market services to Australian businesses and investors.

We are pleased to lodge a submission on the Exposure Draft and draft Explanatory Memorandum to require public disclosure of Country-By-Country (**CbC**) reporting information.

Executive Summary

AFMA recommends that:

- The Australian reporting requirements in relation to Public CbC information align completely with EU Directive 2021/2101, both in terms of timing the information to be reported and the timing of reporting;
- In aligning the reporting requirements to the EU Directive, it is particularly important that no qualitative information should be required to be reported;
- In aligning the reporting requirements to the EU Directive, it is particularly important that the requirement to split out revenues from related parties that are not tax residents of the jurisdiction not proceed;
- The list of jurisdictions to be reported on a non-aggregated basis be aligned completely with the EU list, as that list is updated from time to time;

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- In compiling the information to be disclosed to meet the Australian reporting requirements, entities should be able to adopt either a top-down or a bottom-up approach;
- An additional *de minimis* exemption should be included to reflect the inappropriateness of turnover as a metric for banks and other financial entities, such as average employees of less than fifty;
- The ATO issue guidance at the same time as the legislation receives Royal Assent to assist entities to comply with their reporting requirements; and
- The commencement of the reporting of CbC information publicly be the catalyst for the cessation of the current release of transparency data.

Restatement of AFMA policy position

AFMA was pleased to lodge a submission in May 2023 to the previous Exposure Draft and draft Explanatory Memorandum to give effect to the Government's commitment to release CbC information publicly. We are pleased that many of AFMA's submission points are reflected in the current Exposure Draft, particularly:

- Deferral of commencement to income years starting on or after 1 July 2024;
- The acknowledgement of the need for a *de minimis* exemption for those Significant Global Entities (**SGEs**) that have an immaterial presence in Australia;
- The ability for information in relation to certain jurisdictions to be disclosed on an aggregate basis; and
- The removal of any Australian-specific disclosures above those required by GRI 207, particularly effective tax rate and details of intangible assets, which would have been difficult to calculate and/or would result in the disclosure of commercially sensitive information.

AFMA notes, however, that the current Exposure Draft remains predicated on the alignment to the Public CbC disclosures to those set out in GRI 207, a voluntary standard. AFMA remains unconvinced that the extent to which SGEs currently make voluntary disclosures in accordance with GRI 207 is sufficient that the mandatory public disclosure of CbC information in accordance with GRI 207 requirements will not impose a significant additional compliance burden for most SGEs. This compliance burden arises from the fact that many SGEs that will be required to disclose under the Australian legislation will have a distinct reporting obligation in the European Union, either under EU Directive 2021/2101 or otherwise.

The proposed Australian approach specifically acknowledges that many SGEs that will be reporting under the Australian requirements will also be reporting under the EU Directive. For example, in the draft Explanatory Memorandum at 1.32, it is stated that "where a CBC reporting group has prepared a report under the EU Directive 2021/2101, they are expected to publish a link to, or copy of, this report when publishing the tax information required by these amendments." Further, in determining the list of those jurisdictions that need to be disclosed on a non-aggregated basis, jurisdictions in the European Union (Cyprus, Ireland, Luxembourg, Netherlands) have been removed on the basis that those jurisdictions will have tax information disclosures under the EU's public CbC reporting regime.

The disclosures to be made publicly under the proposed Australian requirements do not align to those under EU Directive 2021/2101. Differences, such as approach to tax, reasons for the

difference between income tax expense and the statutory rate applied to profit (for non-aggregated jurisdictions) and the requirement to separately disclose related party revenue mean that SGEs that report under both disclosure regimes will need to tailor the compliance approach to each regime, thereby exacerbating the compliance burden for no real benefit in terms of transparency or comparability.

Given the acknowledgement by the Government in the Exposure Draft that the Australian approach is predicated on the fact that many SGEs in Australia will report also under an EU Directive, AFMA reiterates that its preferred policy position is to align the Australian disclosure requirements entirely to the EU requirements under Directive 2021/2101.

Issues with Disclosure Methodology and Approach

The non-alignment between the Australian reporting requirements and those in the EU Directive largely relate to qualitative, as opposed to quantitative information, particularly:

- Approach to tax; and
- Reasons for differences between income tax expense and profit multiplied by corporate tax rate for non-aggregated jurisdictions.

Given the proposed publication approach is that the information will be provided by the reporting entity to the Commissioner "in the approved form" before being disclosed on an Australian Government website, it is unclear to AFMA how qualitative information could be disclosed in this way. AFMA notes that this issue would not arise should the reporting requirements be aligned to EU Directive 2021/2101.

Additionally, while there is some alignment between the items disclosed between the proposed Australian requirements and EU Directive 2021/2101, there is a fundamental difference in the way in which the information is to be prepared. The Exposure Draft requires reporting entities apply a top-down approach based on the consolidated financial statements of the entity. The EU and current private CbC rules permit a bottom-up approach, which many AFMA members have adopted globally, both in terms of their private CbC compliance obligations and also the proposed approach to public CbC disclosure requirements. Any requirement to make disclosures based on consolidated financial statements would significantly exacerbate the compliance burden for those SGEs that have adopted a different approach and AFMA requests that the Australian legislation includes the flexibility for reporting entities to use either the top-down or bottom-up approach.

Finally, AFMA has concerns with the proposed requirement in the Exposure Draft that the disclosure of revenue be bifurcated between unrelated parties/related party revenues (from related parties that are not tax residents of the jurisdiction). AFMA understands that the requirement to undertake this split is due to the alignment of the Australian reporting requirements with GRI 207 as opposed to the EU Directive which only requires total revenue to be reported. In addition, the current drafting requires disclosure of related party revenues from only related parties which are not tax residents of the jurisdiction. This requires that intra-jurisdictional related party revenues will need to be excluded from the disclosure. Currently, OECD BEPS Action 13 Country-by-Country Reporting does not specifically require such intra-jurisdictional related party revenues to be eliminated for reporting. The proposed Australian requirement will impose a significant compliance burden on SGEs by being the only requirement

globally that requires SGEs to separately report cross-border related party revenue in every jurisdiction in which the SGE operates.

AFMA recommends that the requirement to separately disclose related party revenue be removed. Alternatively, if bifurcation between unrelated party/related party revenue is required, AFMA proposes that the related party revenue be presented without the specific requirement to eliminate domestic related party transactions within the same jurisdiction.

List of Non-Aggregated Jurisdictions

Under the proposed approach as set out in the Exposure Draft, reporting entities can disclose the required information on an aggregated basis, with the exception of Australia and jurisdictions specifically articulated in the Treasurer's Determination. This list of jurisdictions is proposed to mirror the specified jurisdictions for the purposes of the International Dealings Schedule, except for those jurisdictions within the EU.

AFMA has two concerns with this approach. Firstly, the list of specified jurisdictions differs materially to the corresponding list that the EU requires to be disclosed on a non-aggregated basis. Broadly, this list is sourced from the jurisdictions that the EU has placed on the grey-list or black-list for non-cooperative jurisdictions. These lists are compiled with significant rigour, with the EU willing, where appropriate, to remove jurisdictions from the list where they evidence co-operation in terms of transparency and information exchange. There is significant international scrutiny of the jurisdictions on these lists and it is accordingly appropriate that these jurisdictions are those that need to be reported on a non-aggregated basis. A recent example of a jurisdiction being removed from an EU list was Hong Kong, which was removed in January 2024 for updating its Foreign Sourced Income Exemption regime such that it no longer qualifies as a harmful tax practice. The enhanced robustness of Hong Kong's tax regime should also be reflected in Australia's reporting requirements.

A further concern with Australia adopting a different list, one tied to a mere compliance obligation, is the pejorative language adopted in the draft Explanatory Memorandum to describe the jurisdictions on the list included in the Minister's determination, i.e., "those that are associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities." For example, the proposed Australian list includes Singapore, which is a top-ten trading partner with Australia, is not included on any EU list and with whom Australia has concluded a Double Taxation Treaty. It is difficult to reconcile these characteristics with the comments in the draft Explanatory Memorandum and the government should not underestimate the implications arising from including jurisdictions on its non-aggregated list where the jurisdictions are not included on an EU list.

The easier path is again to align the Australian list of non-aggregated jurisdictions to the EU black and grey-lists to ensure that the list is contemporaneous, reflects recent developments and is internationally consistent. This will be particularly important as more jurisdictions sign up to the common Reporting Standard and/or implement a domestic minimum tax to align with the OECD Pillar 2 initiative, which may result in their removal from the EU list.

De Minimis Exemption

As noted above, AFMA appreciates the inclusion of a *de minimis* threshold which removes the requirement for SGEs with a small presence in Australia from having a reporting obligation. It is noted that the threshold is set at aggregated Australian-sourced turnover of $10 million.

Gross turnover thresholds are problematic for banks and other financial entities that operate businesses with high turnover and low margins. A turnover threshold disproportionately impacts small banks/financial entities relative to other entities who will operate on a similar scale but have a lower turnover and potentially benefit from an exemption.

It is noted that one of the thresholds adopted in the EU for the purpose of applying an exemption from reporting is where average employees over the reporting year is less than fifty. AFMA supports this alternate test applying to determine the application of the *de minimis* exemption on a full-time equivalent basis.

Requirement for guidance

Noting that the Exposure Draft reflects the public disclosure of CbC information based on GRI 207 and the comment in the draft Explanatory Memorandum that taxpayers will need to have regard to both the OECD CBC reporting guidance and GRI 207 in interpreting the disclosure requirements, it is clear that the ATO will need to issue detailed guidance to ensure consistency of reporting and minimisation of compliance burden. Our view is that this guidance should be available contemporaneously with the legislation receiving Royal Assent to impose the disclosure requirement being enacted.

Discontinuance of current transparency measures

Many AFMA members currently have tax information disclosed by the Commissioner, pursuant to Section 3C of the *Taxation Administration Act* 1953. AFMA's view is that the public disclosure of CbC information should essentially be seen as replacing this disclosure and, particularly given that the current disclosure does not materially enhance the public's understanding of the taxation performance of disclosed entities, Section 3C should be repealed.

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Thank you for the opportunity to provide a submission in relation to the Exposure Draft. Please contact me on (02) 9776 7996 or at rcolquhoun@afma.com.au to discuss any of the matters that we have raised in this submission.

Yours sincerely,

Rob Colquhoun
Director, Policy