Public Country-by-Country Reporting

FSC Submission to Treasury exposure draft consultation

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FSC FINANCIAL SERVICES COUNCIL

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1 About the Financial Services Council

The FSC is a peak body which sets mandatory standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our full members represent Australia's retail and wholesale funds management businesses, superannuation funds, investment platforms and financial advice licensees. Our supporting members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing more than $3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is one of the largest pool of managed funds in the world.

The FSC's mission is to assist our members achieve the following outcomes for Australians:

- to increase their financial security and wellbeing;
- to protect their livelihoods;
- to provide them with a comfortable retirement;
- to champion integrity, ethics and social responsibility in financial services; and
- to advocate for financial literacy and inclusion.

2 Introduction

The FSC thanks Treasury for the opportunity to provide a submission on exposure draft legislation for public Country-by-Country Reporting (**CbCR**).

We support transparency and disclosure of tax information that is useful and relevant, both for investment managers in making decisions about the companies in which they invest and in contributing to public debate on tax issues. Public disclosure of tax information should be consistent with and comparable to disclosures in other significant jurisdictions and must also

protect against disclosure of sensitive information that may cause harm to the legitimate commercial interests of businesses.

In order to achieve these objectives, key principles the legislation should follow are to:

- Have regard for the protection of commercially-sensitive information;
- Recognise the need for consistency in disclosure;
- Not impose excessive compliance costs; and
- Ensure the consistency and comparability of data.

We recognise and appreciate that significant changes have been made to the draft legislation since previous consultation in May 2023. The Government has sought to better align the Australian rules with those in other jurisdictions, particularly with the European Union (**EU**) framework. In particular, we note the introduction of a materiality test for entities with a small presence in Australia and the exclusion of a number of bespoke reporting requirements not found in other jurisdictions, such as for intangible assets.

While these changes have significantly improved this exposure draft, the FSC believes that further refinements are needed to improve consistency with other reporting frameworks and ensure the appropriate treatment of commercially-sensitive information.

Our key recommendations are to improve alignment with global reporting frameworks while adopting a safeguard provision for sensitive information in line with international standards for the disclosure of tax information.

3 Consistency with other reporting frameworks

There is a need for public CbCR disclosure requirements to be consistent with both international and domestic rules. This will minimise duplication of reporting requirements and make providing the information simpler for reporting entities, while benefitting transparency to the general public by making disclosures easily comparable and less subject to variance in the definitions or assumptions underlying reported data.

The FSC supports aligning reporting requirements with those used in other jurisdictions. In particular, inconsistencies with disclosures required by the EU regime should be minimised to ensure comparability of data and simplify the reporting process. While we note that the requirements are in much closer alignment in the current draft legislation, some Australia-specific differences are still apparent.

While the current draft legislation proposes a top-down approach to providing information based on consolidated financial statements, the EU approach requires bottom-up disclosure by providing data at the entity level. This makes the process of reporting more difficult, as different entities may be required to disclose under each set of rules. Mirroring the EU process will result in less confusion and a more consistent global approach.

Additional revenue disclosure requirements placed on parent entities that are not required by the EU regime, relating to disclosures from unrelated parties and cross-border related parties, are of little value. As this would require additional disclosure or difficult reconciliation with data

from other parties that is provided in aggregate form, the resulting information would be confusing and not provide meaningful insights. We recommend these requirements be omitted from the draft legislation.

In addition, certainty should be provided on the required timing of Australian disclosures for entities that also report in other jurisdictions. This is important considering the EU requires entities to self-publish disclosures on their website, while reports in Australia made to the ATO Commissioner require this link to be provided before publication. The rules should clarify the process for collating these links, and ensure publication of Australian disclosures occurs at the same time or after parent company reporting.

Australian domestic transparency measures should be coordinated and useful to the public as part of a coherent approach that minimises confusion and improves comparability of data. Disclosures required by other Australian data collection processes should not duplicate the information requirements of public CbCR or create an additional reporting burden by requiring similar information be provided.

Also relevant to this goal is promoting the use of consistent definitions across areas where similar information is used. This will aid in collection and provision of data, while ensuring that the information is comparable, useful and more easily understandable. An example of current practice that would benefit from streamlining is reporting on employee numbers. This information is currently lodged with the ATO calculated on an end-year basis instead of using the averaging method used in corporate tax disclosures and by the OECD, resulting in multiple values being reported without adding value. Information should be presented to the public in a considered and coordinated way to promote transparency and understanding.

If subject to public CbCR measures, an entity should no longer be required to make disclosures where information needs are already met by public reporting. This information can be cross-referenced to data provided by groups that are not subject to the disclosure regime. We suggest that existing Australian corporate data disclosure requirements be amended to align with this approach by the 2025 reporting period.

Recommendation: Further improve alignment in international and domestic reporting requirements for information released under the public CbCR framework. This can be achieved by:

- Mirroring reporting requirements and methodology used under the EU framework;
- Ensuring transparency measures are coherent and consolidated into a single disclosure requirement;
- Clarifying that Australian disclosures are to be made at the same time or after reporting occurs in other jurisdictions; and
- Removing duplicative reporting requirements and using consistent definitions across public CbCR, corporate data disclosures and information lodged with the ATO.

4 Protecting commercially-sensitive information

Release of some information required may have a significant detrimental impact on the commercial position of a reporting entity when disclosed. It is very important that the legislation

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includes a safeguard provision to protect against the release of sensitive information and ensure disclosure does not seriously harm the commercial and competitive position of the reporting entity.

While release of this information would add little value in terms of public debate, it could result in an unfair advantage in the market by enabling competitors to gain insight into business strategies, operational models and profitability.

In order to adequately protect confidential information and maintain consistency with both the Global Reporting Initiative (**GRI**) standards and EU framework, similar provisions should be included in Australian legislation. Not having comparable protections in place also risks entities deciding not to establish operations in Australia due to the potential risk of providing an undue advantage to competitors in jurisdictions where there is no requirement for this information to be publicly released.

GRI standards 1 and 207 provide a model for adopting such a safeguard provision, which protects sensitive information by providing for deferral or omission of information from public reporting in certain circumstances.[1] Entities may be required to publish an explanation outlining the basis on which the relevant information has not been subject to public release.

This approach is consistent with the principle of tax transparency, as the explanations given by entities would be a matter of public record and available for scrutiny as part of public debate on tax policy. It would also remain open to the ATO to receive the sensitive data via private submission for tax assurance purposes,[2] giving confidence that entities are paying their fair share of tax while avoiding potential negative impacts on competition. If required to further promote public confidence, the ATO could publicly attest to the entity's compliance.

A less favoured but alternative means of protecting sensitive information is by utilising the proposed discretion granted to the ATO Commissioner to make exemptions from reporting requirements. As drafted, the proposed draft legislation allows relief to be issued for individual entities, classes of entity or from specific reporting requirements.

Under this approach, amendment to the legislation would be required to clearly state that the exemption provisions are intended to protect sensitive information. Exercise of this discretion should be supported by an application process with clear eligibility criteria that will result in relief being granted if disclosure would be detrimental to the commercial position of the applicant. It should also be clarified in the legislation that entities applying for an exemption must not be required to disclose the relevant information while their request is under consideration.

An Australian subsidiary may potentially face difficulties when a non-resident parent entity in unable to or has not provided the relevant information for release. The legislation should provide for a 'comply or explain' function that allows an entity to publish a statement explaining why the relevant information is not available to the subsidiary, reflecting equivalent provisions in the EU Directive.

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[1] GRI 1: Foundation 2021, 15; GRI 207: Tax 2019, Guidance for 207-4-b, 13.
[2] In line with the approach to confidential information in the OECD BEPS Action 13 Report.

Recommendation: Amend the draft legislation to include a specific safeguard provision that protects commercially-sensitive information from being publicly released to comply with reporting requirements.

The GRI model to allow omission of certain information from release, supported by a public explanation of the rationale for this decision, should be adopted by the legislation. Sensitive information may be submitted to the ATO for review, subject to confidentiality requirements.

Alternatively, in using their discretion to exempt entities from reporting requirements, the ATO Commissioner should be expressly required to prevent release of sensitive information, supported by a clear process and eligibility criteria.

A ‘comply or explain’ provision should be included to allow an Australian subsidiary to publish a statement when information from a non-resident parent is not available.

5 Jurisdictions determination

The exposure draft legislation provides for jurisdictions where reporting of required tax information must be published on a country-by-country basis to be listed in a legislative instrument. This should be closely aligned with significant global reporting frameworks and subject to a clear and transparent process for how jurisdictions are nominated.

We note that the list of specified jurisdictions proposed by the draft Taxation Administration (Country by Country Reporting Jurisdictions) Determination is not aligned with the EU framework and includes a significantly greater number of jurisdictions.

While the explanatory memorandum for the draft instrument outlines that the proposed list is to include jurisdictions ‘typically associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities’, there also does not appear to be an objective standard or mechanism for determining when listing or delisting of jurisdictions may occur, or a process for regular review.

As a result, there is a risk that the draft determination will be arbitrary in its effect and not remain relevant to changing circumstances in international tax practice. This approach contrasts with the process used by the EU to determine their equivalent list of non-cooperative jurisdictions for tax purposes, which involves dynamic compliance monitoring and regular revision up to twice a year in line with established procedural guidelines and using criteria based on international tax standards.[3]

Improvements should be made to the exposure draft to clarify objective criteria for inclusion in the instrument. These should be based on metrics equivalent to those used by the EU. A process of regular review should also be implemented to ensure the instrument remains current and appropriate based on international tax practice. This will also contribute towards

[3] European Council (2024) *EU list of non-cooperative jurisdictions for tax purposes*, available at: https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/

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a standardised global reporting approach, producing information that is more comparable and consistent and be more useful in informing public debate.

Recommendation: The Government should establish objective criteria for jurisdictions to be specified in the determination, based on metrics equivalent to those used by the EU in determining its list of non-cooperative tax jurisdictions. A process for regularly reviewing and updating the list should also be outlined in the regulations.

6 Materiality threshold

We welcome the inclusion of a materiality threshold in the exposure draft to provide for a minimum presence at which a company does not have to report, exempting entities with turnover in Australia of less than $10 million. While the adoption of this recommendation improves the proposed legislation, further refinements could be made to make the measure more effective in practice.

While the explanatory memorandum outlines the threshold is connected to the definition of small business entities, qualification for exclusion under the threshold should not be based on this factor alone. As the rules inescapably relate to large businesses and multinational companies, arrangements are fundamentally different in nature to a small business.

Particularly in financial services, where establishment could require significant start-up capital investment and holdings to create the initial product offering to the Australian market, the level at which Australian operations could be considered significant is also relative on a global scale. The test should also consider the size of the Australian presence relative to the global operations of the company.

A means of capturing this in the threshold rules would be to implement a multi-pronged threshold test, where the Australian presence of a multinational company must meet both a minimum dollar value as well as a proportionate test. This would require the multinational entity to have achieved a minimum percentage of revenue as a proportion of their global business activities. Consistent with the EU threshold, a minimum average number of employees engaged in Australia could also be considered for inclusion as an additional element to this test.

At $10 million, the dollar-value threshold is relatively low, especially considering comparable elements of the EU small enterprise threshold test have recently been increased to allow for a value of between EUR 10-15 million ($16.53-24.8 million).

The language used to describe this threshold could also be simplified in the drafting. Supported by the description in the explanatory memorandum, clause 3D(1)(e) may be more clearly described as based on “aggregate turnover in Australia” over the threshold conditions.

Recommendation: The materiality threshold should be a multi-pronged test, requiring both a minimum dollar value and a proportionality test based on an entity’s presence in Australia as a percentage of global revenue.