



Law Council
OF AUSTRALIA

Business Law Section

24 April 2013

Mr Gerry Antioch
General Manager
Tax System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: taxtransparency@treasury.gov.au

Dear Mr Antioch,

Improving the Transparency of Australia's Business Tax System

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (**the Committee**) welcomes the opportunity to participate in the Government's process of reviewing whether there is sufficient transparency of tax payable by large and multinational corporate tax entities.
2. This submission responds to two of the three proposals (**the proposals**) outlined in the Discussion Paper titled *Improving the transparency of Australia's business tax system* issued in April 2013 by the Assistant Treasurer (**Discussion Paper**).

Outline of submission

3. In this submission, the Committee:

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- (1) provides some introductory comments about the policy design features of the proposals, and in particular, the stated objects underpinning the proposals;
- (2) comments specifically on proposals #1 and #2; and
- (3) notes some of the issues canvassed in a report commissioned by the OECD Informal Task Force on Tax and Development and which it is submitted require further analysis in the Australian context before the government decides whether to proceed to implement the proposals.

Policy Design features

The need for the initiative is not apparent

4. The Assistant Treasurer announced the government's intention to increase the transparency of the business tax system in a Media Release on 4 February 2013. In his media release, the Assistant Treasurer said that:

Improving the transparency of Australia's business tax system will encourage enterprises to pay their fair share of tax and discourage aggressive tax minimisation practices. It will allow the public to better understand the business tax system and engage in debates about tax policy.

5. The Committee notes that the Discussion Paper does not proffer any empirical evidence of the existence, and, if there be any, the extent of, aggressive tax minimisation practices among large or multinational corporations that conduct business in Australia. Nor is there any evidence proffered to the effect that corporate taxpayers, generally, are engaging in activities which are designed to minimise their payment of tax in a manner which is not authorised under the taxation laws.
6. In this regard the Committee notes the representations made by the Commissioner of Taxation to a recent Senate Estimates Committee to the effect that corporate Australia appears to be complying fully with the system designed by current and

prior governments and administrators.¹ The Australian taxation system is a highly robust and comprehensive system. Over several decades now there have been legislative and administrative measures introduced to ensure that “aggressive tax minimisation strategies” are identified and eliminated and those who promote them are sanctioned.

7. Further, the Discussion Paper does not provide any analysis or examples in support of its assertion that increasing transparency of tax payable by large and multinational corporate tax entities will result in increased compliance with the taxation laws.
8. The Committee submits that it is inappropriate policy design to require all companies to disclose information about their tax affairs simply because there is anecdotal evidence that a few large multinational companies utilise aggressive tax practices to avoid paying the amount of tax that is due in some of the countries in which they conduct business.
9. For these reasons, the Committee submits that it should not be assumed that measures requiring the disclosure of certain tax information by large and multinational businesses are necessary to ensure compliance with Australia’s taxation laws.
10. Division 355 of Schedule 1 to the Taxation Administration Act 1953 (**TAA**) prohibits the disclosure of information about the tax affairs of a particular entity, except in certain specified circumstances. Those exceptions are designed having regard to the principle that disclosure of information should be permitted only if the public benefit derived from the disclosure outweighs the entity’s privacy.² Further, the stated objectives of Division 355 are to strike a balance between:
 - (1) protecting the confidentiality of taxpayers’ affairs by imposing strict obligations on key persons not to disclose “protected information”; and

¹ A briefing paper prepared for the Commissioner and Minister when they appeared before the Senate Estimates Committee in October 2012; released by the ATO FOI Unit.

² *Taxation Administration Act 1953 (TAA): Schedule 1 Section 355-1.*

- (2) facilitating effective government administration and law enforcement by allowing disclosure of tax information for appropriate purposes.³
11. The Discussion Paper does not identify what has transpired since the enactment of Division 355 that now requires the provisions to be amended to enable the Commissioner to publish information about a company's tax affairs. In particular, on what basis can it be said that the public benefit of disclosing a large or multinational corporation's tax affairs now outweighs the need for the corporation's privacy? In the Committee's view, a taxpayer's fundamental right to privacy about its tax affairs should not be displaced without first having undertaken a rigorous analysis of the public benefit based on empirical evidence.
12. It is submitted that further analysis is required before any additional reporting requirements are imposed upon companies conducting business in Australia. The analysis should include an assessment of whether there would be any public benefits of disclosure and if there would be any whether that benefit will outweigh the costs of disclosing that information. It is important that Australia not forget that it competes for inbound foreign investment with other jurisdictions and its competitiveness is affected by the views of large companies and multinational business as to the level of difficulty in doing business here.
13. In the Committee's view, the tax information that is currently available to the Commissioner of Taxation from individual company tax returns (including the International Dealings Schedule) and other statutory reporting requirements is sufficient to enable the Commissioner of Taxation (**Commissioner**) to administer the tax laws to ensure that large companies and multinational corporations conducting business in Australia are paying the amount of tax that is legally due. If, contrary to the Committee's view, this is not the case, we submit that other, more targeted measures should be considered to remedy the situation.

³ TAA: Schedule 1 Section 355-10(a), (b)

Inequity between taxpayers

14. Companies are legal entities and are entitled to the protections of the legal system just as any natural person is. Those provisions in the taxation laws that protect a taxpayer's right to privacy and confer taxpayer confidentiality entitlements should apply equitably to all taxpayers of whatever type of personality recognised by the law and in whatever capacity they may derive assessable income or otherwise make taxable gains.
15. In the context of proposal #1, the Committee submits that there should be no distinction between a taxpayer that is a company and an individual taxpayer where the gross income derived by each taxpayer exceeds the \$100 million threshold. While there may be specific provisions in the taxation laws which apply differently to a corporate taxpayer than to an individual taxpayer (for example, the rate of tax, the availability of capital gains tax concessions and the ability to access the grouping provisions), the fundamental right to privacy and confidentiality of taxpayer information contained within the taxation laws should apply equally to all taxpayers.
16. It should not be forgotten that Australia has self assessment systems of taxation and administration that have served, and continue to serve, the community well. There is substantial voluntary compliance with those systems. What is not known is the extent to which the current systems function well because they include the confidentiality regimes currently in place. More particularly, what is not known is whether, and if so to what extent, those systems function as well as they do as a product of taxpaying entities happy to disclose, comfort in the knowledge that their affairs will not be made public unless they choose to engage in a dispute with the Commissioner.

Specific comments on the proposals

Proposal #1: Transparency of tax payable by large multinational businesses and by entities that pay MRRT or Petroleum Resource Rent Tax (PRRT)

17. Proposal #1 is unlikely to provide meaningful information. To the contrary, it is most likely to confuse and stimulate unnecessary and, worse, ill-informed debate. The Discussion Paper identifies the biggest problem in the proposal:

Although the concept of an entity's 'total income' is not defined in the tax laws, it is envisaged that the Commissioner would use the information currently disclosed by corporate tax entities at question six of the company income tax return. This question aims to identify the entity's total gross income for accounting purposes. As such, total income may include amounts of exempt income, non-assessable and non-exempt income and foreign source income. It may also include extraordinary amounts of revenue such as net domestic or foreign source gains arising from events outside the ordinary operations of the entity. This means that an entity's total income is broader than the taxation concepts of ordinary income and statutory income, as referred to in section 6-1 of the Income Tax Assessment Act 1997. It is also broader than common notions of an entity's turnover.

18. Total income can vary from taxable income for a variety of reasons. A company with mostly domestic operations may have the same aggregate income as a company with significant overseas operations. Taxable income may be wildly different on account of exemptions for foreign dividends and branch profits. As such, comparing two taxpayers' total income and taxable income can be meaningless in the circumstances and it would be an unfair imposition on companies to be forced to explain publicly or engage in public debate concerning explainable differences.
19. The complexity of Australia's tax laws is such that the public disclosure of information showing total income, taxable income and tax payable is unlikely to provide the general public with the level of information about whether a corporate taxpayer has paid "its fair share of tax". The concept of what constitutes a "fair share of tax" is a populist and an emotive one and what may be perceived by the public as being fair, will likely have no correlation with the way in which the actual amount of tax payable is calculated having regard to the taxation law. Public disclosure of such information may, therefore, lead to the demonization of a certain class of taxpayer for reasons which have no basis in law. This in itself is inefficient, counterproductive and unfair.

20. To redress the potential for information to mislead, it would be necessary for the Commissioner to be required to include, as part of the publication of the tax return information, an explanation about the corporate tax system in Australia, highlighting that there may be legitimate reasons as to why a company's taxable income may be substantially different from its accounting income. This will facilitate a more informed public debate and hopefully minimise unjustified attacks on large and multinational companies across the board. The need for such explanations tends to throw light on the usefulness of the initiative.
21. The Discussion Paper lacks significant detail. For example, it is not clear from the language used in the Discussion Paper, or the example, whether the information to be published by the Commissioner would be information about the consolidated tax group's taxable income and tax payable or parts of such a group or such a group and other companies.
22. Accordingly, the Committee submits that before proceeding to implement the proposal to require the Commissioner to publish certain tax information, the government should satisfy itself about whether public disclosure is likely to result in improved tax compliance. The ATO has substantial information gathering powers and other tools available to it to enable it to facilitate a high degree of tax compliance. Only if those powers and tools are found wanting, should consideration be given to implementing a proposal to require the public disclosure of a large or multinational corporation's tax information.

Proposal #2: Publish aggregate collections revenue for each Commonwealth tax

23. As noted above, companies enjoy rights under the law just as much as other types of entity do. There is no rationale for discriminating.
24. The Discussion Paper does not provide any real justification for wanting to create a distinction between a corporate taxpayer and an individual taxpayer in relation to the reporting of aggregate amounts of tax. In the Committee's view, a company taxpayer is entitled to privacy, in the same way that an individual is entitled to privacy.

25. Further, even if it is only the parties to an oligopoly who can decipher the implications of disclosures of particular types of taxation collections, such disclosures could reveal competitor information and tend against the behaviours sought from such market players in the policy underlying competition laws in Australia.

OECD's Informal Task Force on Tax and Development

26. The Committee draws your attention to the report commissioned by the OECD Informal Task Force on Tax and Development (**Task Force**) titled *Transparency in reporting financial data by multinational corporations (the Report)*, July 2011, Oxford University Centre for Business Taxation.
27. The Report canvassed, and reached a broad consensus on, the issues involving transparency of financial reporting by multinational companies, in the context of tax and development. The Report is the result of a preliminary evaluation of the issues involved with the transparency in financial reporting and, importantly, the Report did not reach a conclusion on the way forward on whether multinationals should be required to report their financial (including tax data) on a 'country-by-country' basis.
28. One of the messages in the Report is that further study is required before a conclusion is reached about whether the disclosure of tax information to the general public has the effect of increasing compliance. Further, it is acknowledged in the Report that the effects on compliance may vary between developed and developing countries.

Accountability of government

29. The Report sets out and discusses a number of possible objectives for requiring multinationals to disclose information about the amount of tax they pay in a particular jurisdiction.
30. One possible objective discussed in the Report is the objective of holding governments to account with regard to the integrity of administration of tax

collection and the efficient administration of tax collection. The Committee submits that making information about an entity's tax affairs available to the public cannot replace the role of government in the enforcement of tax laws. While accountability is assumed to be a crucial element of increasing compliance with taxation laws in less developed countries, in developed countries, like Australia, there is little evidence to show that the benefit of public disclosure outweighs the importance of privacy laws which apply across the community as a whole.⁴

Public disclosure does not assist administration

31. The Report states clearly that even if the commercial profits of multinationals were made known, the complexity of the tax laws, the allowances and relief available and relevant timing issues make it very difficult for the general public to know the amount of tax due, and to understand that, for a variety of reasons, the tax paid in a particular year may not bear a strong relationship to the tax due with respect to the commercial profits earned that year. The Committee agrees with this view.

Do the benefits of disclosure outweigh the detriments?

32. The Report states that:

... there needs to be a real expectation that the benefits of any further disclosures will outweigh the costs; otherwise the case for further disclosure is weak.

33. The Committee agrees. In the Committee's view, further analysis is required before the proposals in the Discussion Paper are implemented to determine whether the costs imposed upon large and multinational corporations and the ATO are likely to outweigh any public benefit associated with the increased disclosure. It is submitted that the costs of greater disclosure include:

⁴ Finland, Norway, Sweden and Iceland all currently require some type of public disclosure of taxable information. CESifo Working Paper Series No. 4170, *Taxes on the Internet: Deterrence Effects of Public Disclosure*, by Slemrod, Thoresen, Bo found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220132; and *The Effect of Public Disclosure on Reported Taxable Income: Evidence from Individuals and Corporations in Japan*, Makoto Hasegawa, Jeffrey L. Hoopes, Ryo Ishida and Joel Slemrod found at http://www-personal.umich.edu/~makotoh/research_files/Japan_disclosure.pdf

- (1) reputational risk for Australia as a place for doing business, particularly in the Asia Pacific region;
 - (2) a greater imposition upon administrative resources and increased administration costs for multinationals and the ATO who will be charged with reporting the amount of tax payable; and
 - (3) the social cost of public disclosure of a large or multinational corporation's financial information, for example, revealing commercially sensitive information which may jeopardise the entity's competitive position. As the Report indicates, this could lead to the redeployment of the firm's business activities to other countries which do not require the same level of transparency in the publication of tax information to the general public.
34. The only benefit for public disclosure identified in the Discussion Paper is to increase public confidence in Australia's tax system. The Committee submits that this is unlikely to be the case for the reasons identified above.
35. Finally, in the Committee's view, public confidence in Australia's tax system could be enhanced through the provision of greater information by government and the ATO as to the measures which have been implemented to ensure that Australia's tax base is not being eroded by corporate taxpayers shifting taxable profits offshore.

Conclusion

36. Should the Treasury and the Government wish to discuss these views with the Committee, discussions can be initiated by contacting the Committee Chair, Mark Friezer of Clayton Utz, on (02) 9353 4227 or by email at mfriezer@claytonutz.com.

Yours sincerely



Frank O'Loughlin