

General Manager
Law Design Practice
The Treasury
Langton Crescent
PARKES ACT 2600

3 July 2015
Matter 84590

Dear Sir/Madam

Better targeting the income tax transparency laws

Greenwoods and Herbert Smith Freehills Pty Limited (**Greenwoods**) is grateful for the opportunity to participate in the Government's consultation in respect of the Exposure Draft *Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Laws) Bill 2015* (Draft Bill).

Greenwoods is Australia's largest specialist tax advisory firm. In addition to advising ASX-listed and international public companies, Greenwoods also acts for large Australian private companies and their shareholders.

Greenwoods believes that the current disclosure laws in Section 3C of the Taxation Administration Act 1953 (Act) are discriminatory and unjust towards certain classes of taxpayers, in particular private Australian companies. Greenwoods therefore supports the amendments to the Draft Bill as it would mitigate such consequences towards private Australian companies. We set out the rationale for our support in the enclosed Submission.

Thank you for considering this Submission to the Draft Bill. Should you have any questions or wish to discuss our view further, please contact Richard Hendriks.

Yours sincerely



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BETTER TARGETING THE INCOME TAX TRANSPARENCY LAWS
GREENWOODS & HERBERT SMITH FREEHILLS PTY LIMITED (**GREENWOODS**)
SUBMISSION

Greenwoods believes that the current tax disclosure laws in section 3C of the *Taxation Administration Act 1953* (the Act), which were enacted by *Tax Laws Amendment (2013 Measures No.2) Act 2013*, are harsh, discriminatory and unjust for certain company taxpayers whose gross accounting income exceeds \$100 million in any income year.

Greenwoods recognises that the amendments in the Draft Bill are designed to counter and reduce the adverse impacts of the disclosure laws in respect of Australian private companies. Greenwoods supports the amendments as it is a step towards rectifying a law which it considers does not achieve its policy objectives and discriminates towards large companies.

The reasons in support of such the amendments are set out as follows.

1. *Reasons set out in the explanatory memorandum to the Draft Bill*

The explanatory memorandum (EM) to the Draft Bill highlights that the current tax disclosure laws are adverse to Australian private companies because:

- a) The disclosures can reveal commercial information of a private company and undermine its ability to engage in proper commercial negotiations;
- b) The disclosures may compel private companies to restructure their corporate groups in order to fall below the disclosure threshold;
- c) The disclosures would lead to additional costs and compliance burden to private companies in having to justify the tax information to the public; and
- d) The disclosures can negatively impact on the personal privacy and security of the shareholders of private companies.

Greenwoods strongly agrees with these concerns as legitimate reasons why the current disclosure laws should not apply to Australian private companies.

2. *Taxpayer's fundamental right to privacy*

Greenwoods recognises the longstanding principle of the fundamental right to privacy of taxation affairs. The current tax disclosure laws in section 3C of the Act displace this right in relation to companies only, whose gross accounting income exceeds an arbitrary \$100 million threshold.

Of graver concern is that the fundamental right to privacy is not only displaced in respect of Australian private companies that exceed the threshold, but also potentially in respect of the individual shareholders or families associated with those companies. This is because where a company is closely held, disclosure of the income and taxation affairs is tantamount to disclosure of the personal income and taxation information of the owners of those businesses. This is particularly the case because a search through the ASIC registers will usually reveal the individuals or family groups associated with such companies. This is contrasted with public and foreign multinational corporations with potentially many thousands of shareholders and/or no public disclosure of who those persons are.

The fundamental right to privacy of taxpayers' information should be preserved, particularly in respect to private companies. These amendments help rectify the breaches caused by the current disclosure laws and *Greenwoods* therefore supports this.

3. *Misinformation of the tax affairs of shareholders of private companies*

There is a common misconception that the income and taxation of a private company equates to the income and taxation of the owners of that company. The current disclosure laws have the potential to exploit this misconception and result in substantial misinformation in the public regarding the taxation affairs of the individuals and families

behind those companies, where the income of a company is presumed to be the income of those individuals.

This is particularly the case where, for example, ultimate taxation of particular types of income are yet to be borne by those persons, such as exempt and 'non-assessable non-exempt' items of income which will effectively be taxed as an unfranked dividend when ultimately distributed to those individuals; or tax has been paid by other entities or in other jurisdictions but which is credited for the Australian private company, but disclosures suggest the company does not bear tax.

Such misinformation would not only result in the concerns identified in the EM to the Draft Bill, but also create misleading and misguided information as to the tax affairs of the individuals and owners of such private companies, with the potential to "name and shame" them.

4. Purpose of the tax disclosure laws

The explanatory memorandum to the Bill which first introduced section 3C in 2013 stated the rationale for publication of the specified confidential income and taxation information of companies meeting the \$100 million 'income' threshold as being "to discourage large corporate tax entities from engaging in aggressive tax avoidance practices" and "to provide more information to inform public debate about tax policy, particularly in relation to the corporate tax system". Greenwood has two concerns arising from these broad policy statements.

Firstly, the measure of what is a "large" corporate tax entity to which the disclosure laws are meant to apply to has significantly departed from the Australian Taxation Office's (ATO) classification of large taxpayers. Under the ATO's classification, large multinationals and similar are companies with total income of \$250 million and above. However under the disclosure laws, the threshold for "large" is total income of \$100 million – thus capturing entities which would traditionally be considered "small and medium enterprises" under the ATO's administration.

Secondly, Greenwood is not aware of any evidence provided of widespread aggressive tax avoidance practices by companies in Australia which exceed the \$100 million threshold test, and there is certainly no evidence that publication of isolated aspects of the income and taxation affairs of such companies would properly inform public debate about tax policy.

The \$100 million total income threshold is an arbitrary gateway which will cause private Australian companies with gross income exceeding this amount to suffer the potentially very damaging consequences of having their sensitive taxation information disclosed publicly.

5. The disclosure laws are inequitable and lead to unjust results

The current tax disclosure laws are inequitable as they breach the fundamental right to privacy and confidentiality of tax information in respect of some taxpayers only – those specifically targeted by section 3C of the Act. Further, there is no public benefit of disclosing such income and taxation information as it would not stimulate genuine public debate on tax policy. This is addressed further in Part 3. Instead, it would add costs both to the Government and the affected taxpayers of disclosing that information, as well as waste time and resources of companies in having to justify their tax position to the public, or restructure their corporate affairs in order to avoid the disclosure laws altogether.

Conclusion

For the abovementioned reasons, *Greenwoods* supports the amendments in the Draft Bill as it is a step towards protecting private Australian companies from these discriminatory and unjust disclosure laws, and is a significant improvement to the provisions of the Act enacted in 2013.