

EXPOSURE DRAFT

---

BETTER TARGETING THE INCOME TAX TRANSPARENCY LAWS

---

EXPLANATORY MATERIALS



---

## ***Glossary***

---

The following abbreviations and acronyms are used throughout these explanatory materials.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
TAA 1953	<i>Taxation Administration Act 1953</i>



---

# **Chapter 1**

## ***Better targeting the income tax transparency laws***

---

### **Outline of chapter**

1.1 The Exposure Draft ensures that the public release of information by the Commissioner of Taxation (Commissioner) under the income tax transparency laws does not affect the privacy and personal security of the ultimate owners of Australian-owned private companies. It also removes the risk that the release of the information will harm Australian-owned private companies' market environments.

### **Context of amendments**

#### **The confidentiality of taxpayer information**

1.2 Confidentiality of taxpayer information is a central feature of Australia's taxation system and of most developed nations. It supports other essential features of the system, including voluntary compliance and self-assessment. Without the continued application of the confidentiality principle, Australia would run the risk of undermining voluntary compliance with the tax system.

1.3 Australia has a strong legal framework for protecting the confidentiality of information taxpayers provide to the Australian Taxation Office (ATO).

1.4 The purpose of the framework is to ensure that taxpayers have confidence that information they provide to the ATO will not be disclosed without clear policy justification. Only where the public benefit associated with the disclosure clearly outweighs the need for taxpayer privacy may disclosure of confidential taxpayer information be warranted.

1.5 Laws giving effect to this policy are contained in Division 355 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). It is an offence for a taxation officer to disclose protected taxpayer information without a lawful justification (section 355-25). This offence carries a punishment of up to two years imprisonment.

1.6 A disclosure is permitted only in a number of narrowly defined circumstances. These generally relate to disclosures to other government bodies and law enforcement agencies and are generally limited to being for the purposes of administering laws of the Commonwealth, or of the States and Territories (sections 355-50 to 355-70). A taxation officer may also disclose protected information in the course of performing their duties (subsection 355-50(1)).

1.7 Australia's international agreements also provide for the relevant tax authorities to exchange taxpayer information in a range of circumstances relating to compliance with tax obligations and the criminal law.

### **Income tax transparency laws**

1.8 Australia's income tax transparency laws, which are a specific exception to the long-standing policy of protecting taxpayers' confidential information, are contained in section 3C of the TAA 1953. The laws authorise the disclosure of protected taxpayer information by imposing a duty on the Commissioner to publish certain tax information. For every corporate tax entity that reports \$100 million or more in total income, the Commissioner is required to publish the entity's reported:

- name and Australian Business Number;
- total income;
- taxable income or net income (if any); and
- income tax payable.

1.9 All information published under the income tax transparency laws is sourced from taxpayers' tax returns or other information provided by taxpayers to the Commissioner.

1.10 Section 3C applies from the 2013-14 income year. The Commissioner is expected to release the first publication under the laws in late 2015.

### **Assessment of the laws and their impact**

1.11 Australia's income tax transparency laws represent a significant departure from the established framework for the protection of sensitive taxpayer information. As such, the rationale for these laws should be robust and the laws should be targeted to ensure they only apply in

circumstances where the public benefits of disclosure outweigh taxpayer privacy concerns.

1.12 Australia is one of only a small number of countries, including Denmark, Finland, Sweden and Norway, that permit public access to the information in a company's tax return. Japan repealed similar legislation in 2005 on the basis that disclosure was being utilised in ways inconsistent with its initial aim and reports that the disclosure was a factor in causing crimes and harassment.

1.13 On the introduction of these laws, the former government provided the following justifications:

- The base erosion and profit shifting by multinational entities is a concern for the Group of Twenty (G20) and the Organisation for Economic Cooperation and Development (OECD).
- The laws would discourage aggressive tax practices.
- The laws would inform public debate about corporate tax policy.

1.14 The Government has a number of concerns with the laws. Privacy concerns exist for the Australian owners of closely held companies where the disclosure of the companies' information effectively discloses information about the owners' financial affairs.

1.15 Many private companies have raised legitimate concerns about the commercial sensitivity of the information and the impact of disclosure on their personal privacy and security. The nature of the information disclosed can be misleading in that it ignores the residual liability on the owners for personal income tax payable on the company's distributed after tax profits.

1.16 In some cases, the information to be disclosed may not otherwise be available to the private company's competition, customers and suppliers. The information may be used in commercial negotiations to the advantage of larger firms and potentially cause loss to the company.

1.17 Public disclosure of the tax information of private companies may have a number of unintended consequences. These could lead to restructuring of the company's affairs in order to keep below the threshold. As certain trusts, not being corporate tax entities, are not covered by the public disclosure, private companies may be encouraged to restructure to minimise commercial disadvantage.

1.18 Many private companies would bear a disproportionate cost in publishing additional information in order to protect their reputation and provide necessary context to the public about their tax affairs.

## **Summary of new law**

1.19 The Exposure Draft amends Australia's income tax transparency laws to better target the laws to multinational enterprises and other publicly accountable companies.

1.20 The laws will no longer apply to Australian-owned private companies. The laws will continue to apply to multinational enterprises operating in Australia and Australian public companies.

## **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
The Commissioner will not publish the tax information of Australian-owned private companies. The Commissioner will continue to publish tax information pertaining to other corporate tax entities.	The income tax transparency laws require the Commissioner to publish certain tax information pertaining to corporate tax entities that have total income above a certain threshold.

## **Detailed explanation of new law**

1.21 The Exposure Draft amends Australia's income tax transparency laws to exempt Australian-owned private companies. These companies will have their confidential tax information protected.

## **Conditions for the exemption from the income tax transparency law**

1.22 The exemption will only be available to companies that satisfy all of the following conditions:

- The company must be a resident private company.
- The company must not be the wholly-owned subsidiary of a foreign corporate group.



- The company must not have a level of foreign shareholding greater than 50 per cent.

1.23 All of the information used to determine whether the conditions are satisfied is collected from taxpayers on the company tax return. This allows the Commissioner to determine the availability of the exemption for a taxpayer based on information already reported or to be reported. This aligns with the self-assessment basis of the tax transparency laws more generally. Using this existing information also ensures that these amendments do not impose additional compliance costs on taxpayers. *[Exposure Draft, item 1, subsection 3C(1) of the TAA 1953]*

1.24 Entities that are not corporate tax entities or that report a total income of less than \$100 million for an income year will continue to be outside the scope of section 3C of the TAA 1953. *[Exposure Draft, item 1, subsection 3C(1) of the TAA 1953]*

***The company is a resident private company***

1.25 To qualify for the exemption, the company must be a private company and a resident for the relevant income year. *[Exposure Draft, item 1, subparagraph 3C(1)(b)(i) of the TAA 1953]*

1.26 A company is a resident of Australia if it is incorporated in Australia, if it carries on a business in Australia and has either its central management and control in Australia or its voting power controlled by Australian residents (subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)).

1.27 A company is generally a private company if it is not listed on a stock exchange and is not the subsidiary of a listed company. See section 103A of the ITAA 1936 for this and other requirements of the definition of ‘private company’.

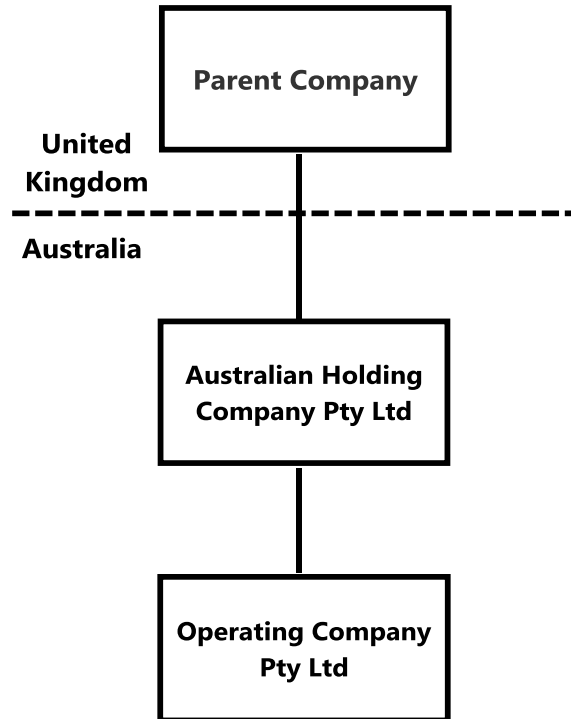
1.28 The Commissioner will assess this criterion for the exemption against the taxpayer’s answers to residency and ownership status questions in the company tax return.

***Subsidiaries of foreign multinational enterprises***

1.29 A company is not entitled to the exemption if it is a member of a wholly-owned group that has a foreign resident ultimate holding company. ‘Ultimate holding company’ and ‘wholly-owned group’ are defined in subsection 124-780(7) and section 975-500 of the *Income Tax Assessment Act 1997* respectively. *[Exposure Draft, item 1, subparagraph 3C(1)(b)(ii) of the TAA 1953]*

1.30 Taxpayers currently disclose the residency of an ultimate holding company in their company tax return.

**Example 1.1: Foreign multinational enterprises**



A multinational group of companies includes two wholly-owned Australian subsidiaries. The parent company of the group is a tax resident of the United Kingdom. The Australian subsidiaries, a holding company and an operating company, have not formed an income tax consolidated group. Both Australian subsidiaries are private companies.

The operating company derives assessable income from its activities in Australia and lodges its own income tax return. The return states that the company's total income is \$110 million.

As a member of a foreign multinational enterprise, the operating company is not entitled to an exemption from the income tax transparency laws. The company's total income, taxable income and tax payable, as specified in its return, are published.

### **Example 1.2 Foreign multinational enterprise with Australian income tax consolidated group**

Assume the same corporate structure as in Example 1.1 except that the Australian entities are members of the same income tax consolidated group at all times during the income year. Australian Holding Company Pty Ltd is the head company of the consolidated group for Australian income tax purposes.

Australian Holding Company Pty Ltd has a total income of \$75 million for the income year. Operating Company Pty Ltd has a total income of \$50 million for the income year.

Operating Company Pty Ltd does not lodge an income tax return and is not subject to the income tax transparency laws. Rather, the head company lodges an income tax return that includes the income earned by its subsidiary (for a total income of \$125 million). Australian Holding Company Pty Ltd is therefore subject to the income tax transparency laws and its information is published on a consolidated basis.

### ***Companies with foreign shareholdings***

1.31 A company that has a level of foreign shareholding that exceeds 50 per cent is not entitled to an exemption. [*Exposure Draft, item 1, subparagraph 3C(1)(b)(iii) of the TAA 1953*]

1.32 Complying with the *Company Tax Return Instructions*, issued by the Commissioner, a taxpayer determines their level of foreign shareholding by reference to the top ten shareholders in their company.

1.33 Foreign shareholders includes shareholders:

- whose address in the share register is shown as being outside Australia;
- that have directed that their dividends be paid at a place outside Australia;
- that are companies not incorporated in Australia; and
- that are companies that do not have an Australian Company Number.

1.34 The shareholdings of every foreign shareholder within the top ten is aggregated and provided in the company tax return in response to a question on the taxpayer's 'percentage of foreign shareholding'.

## **Application**

1.35 These amendments apply to publications under the income tax transparency laws occurring on or after the day following Royal Assent.  
*[Exposure Draft, item 2]*