



CHARTERED ACCOUNTANTS  
AUSTRALIA + NEW ZEALAND

4 September 2015

General Manager  
Corporate and International Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [taxlawdesign@treasury.gov.au](mailto:taxlawdesign@treasury.gov.au)

Dear Sir/Madam,

## Multinational tax avoidance - Country-by-Country reporting and stronger penalties

Chartered Accountants Australia and New Zealand welcomes the opportunity to make a submission on the exposure draft of Tax Laws Amendment (Tax Integrity Multinational Anti-avoidance Law) Bill 2015: Country by country reporting (**ED**) and the accompanying explanatory material (**EM**).

We have no comments to make at this stage on the exposure draft of Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015: Scheme penalties for large companies and the accompanying explanatory material. This draft legislation proposes doubling the administrative penalties for multinational entities that are found to have entered into tax avoidance or profit shifting schemes.

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## Introductory comments

Chartered Accountants Australia and New Zealand supports the introduction of Country by Country (**CbC**) reporting and the new transfer pricing documentation requirements into domestic law in line with the final guidance from the Organisation for Economic Cooperation and Development (**OECD**) in regard to Action 13 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Action Plan. This guidance, set out in the OECD's September 2014 report "Guidance on Transfer Pricing Documentation and Country-by-Country Reporting" (**CbC Guidelines**), is to be contained in Chapter V of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

In summary, the proposed measures, which are to apply to entities with annual global revenue of \$1 billion or more, are to enable:

- introduction of the OECD CbC reporting standard, and
- adoption of the OECD standard on transfer pricing documentation requiring entities to provide a master file and a local file.

The OECD has also developed the "Action 13: Country-by-Country Reporting Implementation Package" (**Implementation Package**), released earlier this year, which includes model legislation for CbC reporting and model agreements for exchange of CbC reports by tax administrations.

We consider that the major challenge faced in introducing the measures will be the development of strong, clear and timely practical guidance by the ATO to facilitate efficient and effective implementation of the proposed measures. Chartered Accountants Australia and New Zealand would welcome the opportunity to be involved in consultation with the ATO in this regard. We recommend that this consultation commences as a matter of urgency.

The statement provided to the Commissioner by affected entities under the proposals will contain extremely sensitive business information so adequate safeguards on how data is collected, used and disseminated across jurisdictions by the ATO need to be in place. We also submit that the government needs to clearly communicate how CbC reporting fits in with the move towards increased transparency.

We elaborate on these issues below and also provide comments on other aspects of the draft legislation.

### 1. Consistency with OECD CbC Guidelines

The OECD has already produced significant guidance on CbC reporting and related transfer pricing documentation in regard to Action 13 of the BEPS Action Plan in the CbC Guidelines and the Implementation Package. Our view is that the implementation of CbC reporting domestically should leverage off this guidance to the maximum extent possible. This is also expected to ensure that Australia is in step with other jurisdictions adopting the initiative.

We agree with the approach in the ED requiring a statement, in the approved form to be provided to the Commissioner. This will allow administrative flexibility in the implementation of CbC reporting obligations, including the ability to adapt to changes as the new CbC reporting framework across jurisdictions evolves. If implemented effectively, we anticipate the benefits of this approach to include reduced compliance costs for affected entities due to more consistent reporting and also reduced costs for tax administrations in using that data to conduct transfer pricing risk assessments.

## 2. Comments on the draft legislation

### *Fiscal year used*

Proposed s815-855 requires an entity to give the Commissioner a statement for the income year if the annual global revenue *in relation to that year* is \$1 billion or more. We note that the Implementation Guidance (Article 1(3) of the Model Legislation relating to Country by Country Reporting) excludes MNE Groups on the basis of a Group's total consolidated group revenue during the Fiscal Year *immediately preceding* the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year. [*Emphasis added*] To maintain consistency, we think that the annual global revenue for the preceding year should be used in s815-355(1).

### *Drafting error in 815-360*

Proposed s 815-360(1) makes the reference to 'this section'. This should be to 815-355.

### *Annual global revenue - proposed definition*

Annual global revenue in the ED is determined under proposed sections 177DA(5) to (7) of the Income Tax Assessment Act 1936 contained in the draft of the Tax Laws Amendment (Tax Integrity Multinational Anti-avoidance Law) Bill 2015. These proposed provisions define annual global revenue in terms of non-residents but the measures in the ED are also to apply to resident taxpayer with annual global revenue of \$1 billion. We recommend that a definition incorporating residents as well as non-residents is devised.

## 3. Implementation – ATO guidance

In our view, the major challenge of the proposed measures will be their implementation as the "devil will be in the detail". It is therefore crucial that the ATO develops strong, clear and practical guidance before the CbC reporting regime commences on 1 January 2016.

Some of the issues we have identified to date include the following.

### 3.1 Different income years of ultimate parent entity and Australian subsidiary

Proposed s815-355 requires a statement in the approved form in *relation to an income year* to be filed before the end of the next *income year*. This raises the issue of whether the CbC documentation is prepared based on an Australian tax year as compared to, for example, the fiscal year end of the worldwide group's parent entity. In respect of CbC reporting and the master file, the CbC Guidelines (Annex 1 and 3) indicate that these documents would be prepared on the basis of the fiscal year of the worldwide group's parent entity. In our opinion, this position should be adopted otherwise an unreasonable and unnecessary compliance burden will result.

### 3.2 Exemptions from the reporting requirements

The EM (at paragraph 1.20) states that the ATO will provide advice on how an entity can seek to be excluded from the reporting requirement in proposed s815-360. It is crucial that the ATO provides guidance on the circumstances where it would be appropriate to provide an exclusion. The only examples provided in the EM are where entities do not have any cross border transactions or where cross border related party transactions are 'insignificant'. No indication of what is considered be insignificant is provided.

We note that the CbC Guidelines provide a discussion around materiality<sup>1</sup> and recommend that jurisdictions set materiality thresholds in relation to the local file by taking into account factors such as the size of the local entity in relation to the entire group and local conditions. It goes on to say that these thresholds could be set in relative or absolute terms. Specific comments are also made in regard to small to medium-sized entities, where reduced documentation requirements are contemplated.

On a separate issue, given the breadth of the measures in terms of entities included in proposed s815-355, we consider that the ATO will need to promptly consider providing exclusions for particular types of entities, for example superannuation funds.

### **3.2.1 Jurisdiction of ultimate parent entity not adopting CbC reporting**

Paragraph 1.21 addresses the situation where the CbC report is filed in the jurisdiction of the multinational group's worldwide parent entity and that report can be automatically exchanged with the ATO. In this scenario, the CbC report may not need to be filed with the ATO by the Australian subsidiary of a foreign group.

There will be a number of Australian subsidiaries of multinational groups where the worldwide parent entity is not required to produce a CbC report in its home jurisdiction because that jurisdiction has not implemented CbC reporting or delays its introduction (we note that Australia will be an early adopter of CbC reporting from 1 January 2016). A situation could also arise where there are no arrangements in place for the exchange of the CbC report.

Where CbC reports are not prepared by the parent, our view is that it is unrealistic to require the local subsidiary to produce a CbC report, covering information for the entire group as it is reasonable to assume that the local subsidiary would not be in control of the relevant information.

We consider that other options should be explored on how the necessary information can be provided to the ATO in an efficient and cost effective manner.

### **3.2.2 Tax consolidated groups**

The ED and the EM at paragraph 1.22 indicate that each member of a tax consolidated group will have an obligation under s815-355. In our view, consideration should be given to making a general exemption under proposed s815-360(4) in respect of members of a tax consolidated group so that the obligation to provide the statement would rest solely with the head company.

## **3.3 Compliance costs**

There will be a number of definitional issues that will arise in relation to the information reported. In order to minimise compliance costs, we recommend that the position adopted for each taxpayer should be consistent with interpretations used in global implementation and in the global consolidated accounts of the group.

In our view, another important way to minimise compliance costs will be by introducing some stated tolerance of materiality in the accuracy of information provided in the reports. We believe there is a strong case for this approach particularly since this information will be used by the ATO to support risk assessment activity rather than to assess income tax obligations.

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<sup>1</sup> Section D.3 (paragraphs 32-34) on Materiality in the CbC Guidelines.

### 3.4 Interaction of CbC reporting, transfer pricing documentation and International Dealings Schedule

There will be overlap between what is in the transfer pricing documentation prepared when the income tax return is lodged and what is in the master and local file. For example, questions will arise as to whether there is duplication between the master file and local files and the International Dealings Schedule (IDS). Moreover, further overlap may arise in relation to documentation requirements under section 284-255 which must be satisfied to have a reasonably arguable position. We submit that the ATO needs to develop procedures to minimise overlaps in the information it requires from affected entities to minimise compliance costs.

### 3.5 Implementation and timing

The measures in the ED apply in relation to income years starting on or after 1 January 2016 with the first statement due to be lodged before the end of the next income year. In our opinion, the ATO will need to issue initial guidance in the very near future and be in a position to issue further guidance before the end of this calendar year at the latest. This material is required to guide entities in determining whether they are affected by the measures and if so, what information is required to be produced so that systems can be put in place to efficiently and effectively capture that material in advance of the 1 January 2016 start date. This is likely to involve undertaking 'dry-runs' to determine whether the requisite information is being collected and if not, making the necessary changes in data collection.

Chartered Accountants Australia and New Zealand would welcome the opportunity to be participate in consultation with the ATO in developing guidance on the operation of the measures. In our view, this consultation should commence as soon as possible.

### 3.6 Confidentiality and Data Safeguards

The CbC report, master file and local file will contain very sensitive business information so there are significant concerns over how this data will be collected, used and disseminated across multiple jurisdictions. It will be crucial that the ATO has in place appropriate safeguards to ensure confidentiality across jurisdictions. This was a major concern raised by businesses during consultation on the development by the OECD of the CbC Guidelines which explain that tax administrations should take all reasonable steps to ensure that there is no public disclosure of confidential information and other commercially sensitive information contained in the documentation package.<sup>2</sup>

## 4. Public disclosure

The interim report<sup>3</sup> by the Senate Economic References Committee on its inquiry into corporate tax avoidance was released on 18 August 2015. One of the recommendations<sup>4</sup> in the report is that the government should consider publishing excerpts from CbC reports.

We submit that the government should adopt a measured and considered approach to any public disclosures relating to CbC reporting and clearly communicate its position. Although we appreciate and accept the need for increased transparency, it is crucial that groups can be confident that sensitive business information will not be disclosed publicly.

<sup>2</sup> Section D.7 (paragraphs 44 and 45) on Confidentiality in the CbC Guidelines.

<sup>3</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Corporate\\_Tax\\_Avoidance/Report\\_part\\_1](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance/Report_part_1)

<sup>4</sup> Recommendation 6 of the Interim Report -

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Corporate\\_Tax\\_Avoidance/Report\\_part\\_1](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance/Report_part_1)

Should you have any queries concerning the matters discussed in our submission, or wish to discuss them in further detail, please contact me via email at: [michael.croker@charteredaccountantsanz.com](mailto:michael.croker@charteredaccountantsanz.com); or telephone (612) 9290 5609.

Yours sincerely

A handwritten signature in black ink that reads "Michael Croker". The signature is written in a cursive, flowing style.

**Michael Croker**  
**Tax Leader Australia**  
**Chartered Accountants Australia and New Zealand**