



**CORPORATE TAX
ASSOCIATION**
of Australia Incorporated

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

Email: taxlawdesign@treasury.gov.au

MULTINATIONAL TAX AVOIDANCE – COUNTRY BY COUNTRY REPORTING

The Corporate Tax Association welcomes the opportunity to provide a submission on the exposure drafts for inserts to the *Tax Laws Amendment (Tax Integrity Multinational Anti-avoidance Law) Bill 2015: Country by country reporting (the CbC Bill)* and the *Tax and Superannuation Laws Amendment (2015 Measures No.4) Bill 2015: Scheme penalties for large companies (the Penalties Bill)* and the accompanying Explanatory Materials (EM).

We have focussed our response on the CbC Bill and EM.

The CbC Bill and EM

As mentioned in the EM, the proposed amendments are aimed at implementing Action 13 of the G20 and OECD BEPS Action Plan which recognises that enhancing transparency for tax administrations provides them with “adequate information to conduct transfer pricing risk assessments, [as] an essential part of tackling base erosion and profit shifting.”¹ As you are aware Australian rules and administrative practice such as the 16 page International Dealings Schedule and real time compliance approaches such as the pre-compliance review provide the ATO with a significant amount of data and information on related party transactions to assess risk. This, coupled with existing transfer pricing documentation requirements under sec 284-255 of Sch. 1 of the *Taxation Administration Act* currently provide granular detail to assist the ATO in its compliance activities. Our major concern with the proposals is they potentially create an obligation on all corporate entities within a group that meet the \$1 billion threshold, to prepare additional statements and documentation, depending on whether the ATO may by administrative process, reduce statement requirements should it feel appropriate to do so.

¹ See page 9 OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting.

Statements should only be provided by the head entity and take into account current transfer pricing documentation simplification measures and Advance Pricing Arrangements

Although the CbC Bill is to only apply to groups with global revenue of \$1 billion or more, and there is a recognition in the EM at paragraphs 1.20 and 1.21 that the Commissioner may exclude specific entities from having to report where for example there are no cross border related party dealings or (yet undefined) insignificant related party transactions, in our view there is insufficient guidance given to the Commissioner in the EM as to when such exclusions should apply. In fact it appears the rules are designed such that all Australian entities in a global group must provide an annual statement and at least one entity in a group may be required to lodge (and possibly prepare) CbC reports and master files as well as local files in addition to transfer pricing documentation under section 284-255 of Schedule 1 of the *Taxation Administration Act 1953* to avoid the possibility of administrative penalties. This appears to be the case even where such entities:

- are not part of a group headquartered in Australia; or
- have insignificant low risk international related party transactions; or
- are not required to file an income tax return as they are part of a tax consolidated group.

In our view the requirement to lodge a statement and possibly supply a CbC report, master and local files should only be required from the head entity of the tax consolidated group on behalf of the group (and not by all subsidiaries) and then only in cases where the head entity:

- has more than \$10 million in international related party dealings; or
- can not avail itself of documentation simplification guidance or other guidance issued under the Commissioner's general powers of administration from time to time;² or
- does not have an Advance Pricing Arrangement in place.

To do otherwise effectively overrides existing safe harbours and processes put in place specifically to minimise the cost of compliance for both taxpayers and the ATO and reduce if not eliminate transfer pricing risk.

² See: <https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Simplifying-transfer-pricing-record-keeping/>

Carve outs for holdings in entities listed on foreign stock exchanges

We would also recommend that where an Australian head entity holds an interest in a foreign entity that is listed on a foreign stock exchange and that group meets the comparable OECD equivalent of \$1 billion in its own right for CbC reporting, that there is no requirement for the Australian head entity to provide related party details as the listed entity will be required to prepare its own CbC report and master file.

Consultation on the development of statements and approved forms

We would recommend that the EM should specifically refer to the requirement that any statement and CbC reporting requirements must take into account existing disclosure and documentation requirements and materiality thresholds. We also strongly recommend that any statements that are designed by the ATO should be undertaken in consultation with Treasury, the ATO and impacted taxpayers to ensure an appropriate balance between the need for adequate documentation and unnecessary red tape. In this regard we feel that Example 1.1 could be amended (as highlighted in yellow below) to reinforce this point:

Example 1.1

Ortberger Ltd is a worldwide parent entity with wholly owned subsidiaries across 17 jurisdictions and annual global revenue of \$2.5 billion. Ortberger is a resident of a country with an agreement in place to automatically exchange information with Australia.

Four of Ortberger's wholly owned subsidiaries (that are not part of a tax consolidated group) are resident in Australia and have been included in Ortberger's audited consolidated financial statements for the 2016–17 income year.

Ortberger, as the worldwide parent entity, files a CbC report with its local tax authority. As the Commissioner receives Ortberger's CbC report under the agreement, the Commissioner shall specify that the four entities resident in Australia do not need to include the CbC report in their statement.

If one of the entities resident in Australia includes the master file in its statement to the Commissioner, then the Commissioner shall specify that the other three entities do not have to provide the master file in their statements.

All four local entities must provide the Commissioner with a statement containing the local file if that entity has more than \$10 million of international related party dealings, has not availed itself of documentation safe harbours issued by the Australian Taxation Office or does not have an Advance Pricing Arrangement in place. Should any of the four Ortberger subsidiaries be part of a tax consolidated group, only the head entity of that consolidated group should be required to file a statement, possibly a master file and a local file on behalf of that consolidated group.

Statements should reflect that other countries may delay or not implement CbC reporting

Whilst proposed subsec. 815-360(4) states that the Commissioner may by legislative instrument determine that the section does not apply to a specified class of entity, in our view there is insufficient protection from penalties (and criminal sanctions) for non lodgment of a statement for Australian based subsidiaries of foreign groups from the requirement to prepare and lodge CbC reports and master files in circumstances beyond their control.

Although the EM at paragraph 1.27 mentions that the Commissioner will have flexibility to specify the information required on the approved form, there appears to be an onus on the local entity to provide CbC and master files to the Commissioner even where the world wide parent is not required under parent country rules to create a CbC report or master file. We note that at page 25 of the *OECD Guidance on Country by Country Reporting* the OECD states:

“There are, however, different views about the filing process for the master file and the country-by-country report, and consequently the mechanisms by which the information is to be made available to tax administrations in all relevant countries”

The OECD goes on to state Working Party No. 6, amongst other things, will undertake an analysis of the potential mechanisms for filing and disseminating the master and CbC report and notes “the importance that the development of effective phase in rules may have for successfully transitioning to the new documentation regime.”³ In our view, until this work is completed, it is not appropriate to have approved forms requiring local lodgment of a CbC report and master files particularly if a local affiliate will not have access nor legal right to obtain either the CbC report or master file documentation or in fact be in a position to create such documentation.

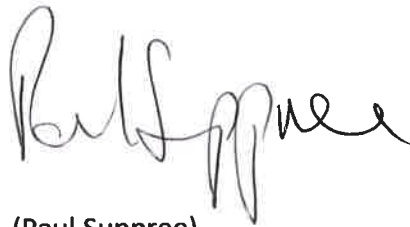
We would strongly recommend that subsec. 815-360 is amended to specify that there is no requirement to lodge a statement, CbC report or master file if a taxpayer’s foreign headquartered parent is not required to lodge a CbC report and/or master file in their home country. In addition the EM should also be amended by expanding on the commentary in paragraph 1.28 by adding wording to the effect that:

³ Refer Section E “Implementation and review” at pages 25 and 26 of the OECD on Action 13 deliverables.

"A local entity will not be required to provide a CbC report or master file to the Commissioner until such time that the world wide parent entity is required to file a CbC report and master file with its home country tax authority and then only if the CbC report and/or master file have not been provided to the Commissioner under information sharing arrangements in place with that tax authority."

Should you have any questions in relation to the above, please feel free to contact me on (03) 9600 3865.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Paul Suppree". The signature is fluid and cursive, with the first name "Paul" being more prominent than the last name "Suppree".

(Paul Suppree)
Assistant Director
Corporate Tax Association