



**Australian Government**

# **OECD Proposals for Mandatory Disclosure of Tax Information**

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Discussion Paper  
May 2016

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## CONSULTATION PROCESS

### Request for feedback and comments

The Government is seeking your views on the framing in Australia of the OECD's recommendations to introduce mandatory disclosure rules.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

### Closing date for submissions: 15 July 2016

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## I. INTRODUCTION

1. The purpose of this paper is to seek community input on Mandatory Disclosure Rules, which require tax advisers to make early disclosures of aggressive tax arrangements (often before income tax returns are lodged), with the view to providing tax authorities with timely information on arrangements that have the potential to undermine the integrity of the income tax system.<sup>1</sup>

### Background

2. On 3 May 2016, the Government announced that it will consult on the framing of Mandatory Disclosure Rules in the Australian context. Mandatory Disclosure Rules are discussed in the Final Report of Action Item 12 (**Final Report**) of the Organisation for Economic Co-operation and Development (**OECD**)'s Base Erosion and Profit Shifting (**BEPS**) Project.
3. The Final Report provides a policy framework for countries without Mandatory Disclosure Rules to design a regime that enhances their ability to obtain early information on aggressive tax arrangements and their users. The recommendations in the Final Report do not represent a minimum standard and countries are free to choose whether to introduce Mandatory Disclosure Rules.
4. The Final Report also notes that Mandatory Disclosure Rules should be designed so as to appropriately balance competing policy priorities including reducing unnecessary compliance burdens on taxpayers:

Mandatory disclosure regimes should be clear and easy to understand, should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration, should be effective in achieving their objectives, should accurately identify the schemes to be disclosed, should be flexible and dynamic enough to allow the tax administration to adjust the system to respond to new risks (or carve-out obsolete risks), and should ensure that information collected is used effectively.<sup>2</sup>

### The purpose of this paper

5. The purpose of this paper is to seek community views on how Mandatory Disclosure Rules should be framed in the Australian context, having regard to the disclosure rules that are currently available to the Australian Taxation Office (**ATO**). The paper also provides an outline of the OECD's key recommendations, and the Government's preliminary views in relation to those recommendations.

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1 Key terms 'tax advisers' and 'aggressive tax arrangements' are used in this paper in their ordinary meaning.

2 See, OECD/G20 Mandatory Disclosure Rules Action 12: 2015 Final Report, page 9 <<http://www.oecd-ilibrary.org/docserver/download/2315371e.pdf?expires=1461897842&id=id&accname=guest&checksum=99F3F685D9F8E02C520F8142AB7C4E52>>.

6. Consistent with the OECD's Final Report, the Government will be focused on finding a way to appropriately balance competing policy priorities, including enhancing information available to the ATO to crack down on tax avoidance and avoiding unnecessary compliance burdens on taxpayers. A key priority will be ensuring that there is no unnecessary overlap with existing disclosure rules.
7. After reaching a final position on how Mandatory Disclosure Rules should be framed, the Government anticipates further consultations on implementation design issues.

## II. CURRENT DISCLOSURE RULES

8. As summarised in Table 1, Australia currently has a range of income tax disclosure rules in relation to large businesses and multinationals; particularly following the Government's implementation of the BEPS project. These include:
  - 8.1. Disclosures which are made by companies before their income tax returns — including Annual Compliance Arrangements, Advanced Pricing Agreements and Pre-Lodgement Compliance Reviews — all of which are compliance arrangements under which companies voluntarily agree to provide relevant tax information to the ATO.
  - 8.2. Disclosures which are made by companies as part of their income tax returns — including Reportable Tax Position Schedules which require large businesses to disclose their most contestable and material tax positions.

**Table 1: Overview of current disclosure rules**

	Description	Information provided	How does ATO use this information?	Targeted cohort
<b>1. The BEPS project</b>				
Common Reporting Standard	Financial institutions are required to undertake due diligence to identify Reportable Accounts (accounts held or controlled by foreigners) and report this to the ATO. The ATO can then exchange this information with international tax authorities.	ATO will annually receive information on Australians' offshore accounts, such as investment income and balances.	The ATO can use this information to check if the offshore income has been declared in Australian tax returns, which will assist in identifying Australians who have chosen to dishonestly hide foreign income offshore.	Individuals not disclosing income from off-shore investments.  The CRS will be progressively introduced from 1 July 2017, with the first exchange of information with international tax authorities expected in 2018.
Country by Country Reports  Timing: 12 months after the end of the income year	Requires Significant Global Entities (entities with annual global income exceeding \$1 billion) to provide detailed information in relation to their transfer pricing policies and methodologies.	Taxpayers may be required to provide the following to the ATO: <ul style="list-style-type: none"> <li>• A Master File — detailing global transfer pricing policies, global value chains and an overview of their global organisational structure;</li> <li>• A Country-by-Country Report — an itemised breakdown of income and tax paid in every country in which they operate;</li> </ul>	Risk analytic tools are applied to this information to detect trends and patterns that may display characteristics common to tax planning strategies.	Significant Global Entities



**Table 1: Overview of current disclosure rules (continued)**

	Description	Information provided	How does ATO use this information?	Targeted cohort
<b>1. The BEPS project (continued)</b>				
		<ul style="list-style-type: none"> <li>Local file — certain information and documentation in relation to controlled cross-border transactions.</li> </ul>		
<b>2. Disclosure before lodgement of tax returns</b>				
<p>Rulings (private, class and product).</p> <p>Timing: Generally pre-lodgement</p>	<p>Taxpayer voluntarily applies to the ATO for the ATO’s view on how the law applies to a specific tax arrangement.</p> <p>The ATO is required to provide their view on the arrangement and is bound by that view. Taxpayers are not obligated to seek a ruling, and the decision to do so is voluntary.</p>	<p>Generally, the following information will be provided:</p> <ul style="list-style-type: none"> <li>questions/issues on which the taxpayer is seeking a view (including the application of specific tax provisions);</li> <li>facts describing the scheme or arrangement; and</li> <li>taxpayer/tax adviser view as to why the arrangement complies with the law.</li> </ul>	<p>The ATO will consider the matters raised in the ruling and issue a legally or administratively binding view to the taxpayer. In some instances, rulings may assist the ATO in identifying broader systemic or emerging tax risks.</p> <p>The ATO publishes an edited version of private binding rulings and also publishes class rulings.</p>	<p>All taxpayers may apply for a ruling on a voluntary basis. There is no compulsion on any taxpayer to apply for private rulings from the ATO.</p>
Annual Compliance Arrangements (ACAs).	ACAs are voluntary administrative arrangements which set out a framework for managing the compliance relationship between the	Information provided is determined by the scope and terms of the arrangement. Information is generally provided in real-time as	In the normal course of the ATO’s administration of the taxation laws in relation to the relevant affected taxpayer.	Selected large taxpayers who voluntarily enter into an ACA.

**Table 1: Overview of current disclosure rules (continued)**

	Description	Information provided	How does ATO use this information?	Targeted cohort
<b>2. Disclosure before lodgement of tax returns (continued)</b>				
Timing: Pre-lodgement	ATO and a taxpayer. Taxpayers will generally approach the ATO to enter into an ACA. The ATO will decide on a case-by-case basis whether an ACA is suitable. A taxpayer with an ACA may still be subject to compliance action in relation to matters outside the scope of the ACA.	Taxpayers enter into schemes and adopt tax positions.		
Pre-lodgement Compliance Reviews (PCRs). Not required under legislation.  Timing: Generally pre-lodgement	The PCR is an administrative process primarily used by the ATO for some large public companies not covered by an annual compliance arrangement. PCR process aims to assure the right tax outcomes and identify and manage material tax risks with taxpayers through early, tailored and transparent engagement.	Information provided by a taxpayer in relation to particular tax risks about which they seek reassurance.	The information is used to determine the correct tax outcome in relation to the issues and risks raised.	A limited number of selected Significant Global Entities and large corporate taxpayers not covered by an ACA.

**Table 1: Overview of current disclosure rules (continued)**

	Description	Information provided	How does ATO use this information?	Targeted cohort
<b>2. Disclosure before lodgement of tax returns (continued)</b>				
<p>Advanced Pricing Agreements (APAs).</p> <p>Timing: At any time</p>	<p>APAs are voluntary arrangements entered into between the ATO and taxpayers that determine, in advance of controlled transactions, an appropriate set of criteria for the determination of the transfer pricing of those transactions over a fixed period of time. Taxpayers will generally approach the ATO to enter into an APA. The ATO will decide on a case-by-case basis whether an APA is suitable.</p>	<p>In negotiating an APA, a taxpayer will provide details of the transfer pricing transaction in question including the identity of foreign related parties, and the role of the Australian entity in the global group and value chain.</p>	<p>The ATO uses this information to determine the appropriateness of entering into an APA and the details of any such agreement.</p>	<p>Taxpayers who voluntarily enter into an APA.</p>
<b>3. Disclosure as part of tax returns</b>				
<p>Reportable Tax Position Schedule (RTPS).</p> <p>Timing: Lodgement (although the taxpayer may elect to make early disclosure)</p>	<p>The RTPS is a schedule to the company income tax return that requires some large businesses to disclose their most contestable and material tax positions.</p>	<p>Generally, the taxpayer or their adviser will provide the following for positions that the taxpayer or their adviser consider are relevantly contestable and material:</p> <ul style="list-style-type: none"> <li>• A concise description of the arrangements;</li> </ul>	<p>Information is used to complete audits and other compliance action in relation to the taxpayer.</p> <p>The information is also used to build a broader understanding of the risks in the market.</p>	<p>Selected significant global entities, large corporate taxpayers.</p>

**Table 1: Overview of current disclosure rules (continued)**

	Description	Information provided	How does ATO use this information?	Targeted cohort
<b>3. Disclosure as part of tax returns (continued)</b>				
		<ul style="list-style-type: none"> <li>• The basis of the taxpayer’s position;</li> <li>• The category of Reportable Transaction; and</li> <li>• Details of any related parties.</li> </ul>		
<p>Tax Returns &amp; Schedules.</p> <p>Timing: Lodgement</p>	<p>Tax return providing a summary of the calculation of a taxpayer’s tax payable.</p> <p>Schedules to the tax returns provide additional information to the tax return, and can cover items such as; rental income, capital gains, losses, and trust distributions.</p>	<p>The tax return and its schedules provide a high level summary of the components of a taxpayer’s tax payable; including:</p> <ul style="list-style-type: none"> <li>• Income and expenses;</li> <li>• Adjustments to taxable income due to reconciliations between accounting and tax;</li> <li>• Specific tax events (that is, capital gains, trust distributions, partnership income, etc.)</li> </ul>	<p>Risk analytic tools are applied to this information to detect trends and patterns that may display characteristics common to tax planning strategies.</p>	<p>All taxpayers who lodge a tax return</p>
<p>International Dealings Schedule (IDS).</p>	<p>Requires taxpayers with international dealings exceeding \$2 million (or other certain cross-border</p>	<p>Taxpayers complete a schedule providing details of the aggregate value of cross-border transactions.</p>	<p>Risk analytic tools are applied to this information to detect trends and patterns that may display</p>	<p>All taxpayers with cross-border transactions exceeding \$2 million</p>

**Table 1: Overview of current disclosure rules (continued)**

	Description	Information provided	How does ATO use this information?	Targeted cohort
<b>3. Disclosure as part of tax returns (continued)</b>				
Timing: Lodgement	transactions), to provide high level details of those transactions.	For each category, taxpayers are only required to list the top 3 transactions for the top 3 countries (as measured by the aggregate value of transactions).	characteristics common to tax planning strategies. Some kinds of relevant arrangements may be more difficult to detect from information provided in the IDS, for example, arrangements involving relevantly connected international related party dealings included in amounts shown at different labels of the IDS.	
<b>4. Disclosure after lodgement of tax returns</b>				
Exchange of Information (EOI).  Timing: Any, but generally post-lodgement.	ATO has agreements in place with other tax jurisdictions to exchange taxpayer information. In the case of specific EOI requests, this requires the ATO to be in possession of sufficient information about actual or potential relevant arrangements to be able to identify the need to request information under EOI.	Information held by foreign revenue authorities, in particular details of taxpayers' foreign assets and foreign income, which may include interest, dividends and royalties.	This information is used to identify taxpayers that have failed to disclose foreign source income to the ATO.	All taxpayers.

**Table 1: Overview of current disclosure rules (continued)**

	Description	Information provided	How does ATO use this information?	Targeted cohort
<b>4. Disclosure after lodgement of tax returns (continued)</b>				
<p>Questionnaires sent by the ATO to selected taxpayers (for example, Private Group Structure Questionnaire (PGSQ)).</p> <p>Timing: Post-lodgement</p>	<p>A questionnaire is an information gathering method to gather information to gain a better understanding of an issue. The PQSG seeks to obtain a better understanding of how a wealthy individual conducts their business and tax affairs.</p>	<p>The PGSQ requires full disclosure of all entities that the wealthy individual (or their private group) controls.</p>	<p>The information is used to inform compliance activity and resolve identified risks in relation to high wealth individuals and private companies.</p>	<p>All, but generally high wealth individuals</p>
<p>Formal powers that enable the ATO to gather information.</p> <p>Timing: Any, but generally post-lodgement</p>	<p>Legislative powers that require a person or entity to provide information to the ATO, or to attend and give evidence or produce documents. Penalties apply for non-compliance.</p> <p>This requires the ATO to be in possession of sufficient information about actual or potential relevant arrangements to be able to identify the need to request information.</p>	<p>The information provided is dependent on the nature of the request. Information requested usually relates to known risks, as the exercise of formal powers must be for specific information relevant to specific tax functions, for example the making of assessments.</p>	<p>The information is used for the purpose of making tax assessments and conducting other aspects of tax administration.</p>	<p>Taxpayers about which the ATO has sufficient information to conclude they may be non-compliant.</p>

### **III. KEY OECD RECOMMENDATIONS ON MANDATORY DISCLOSURE RULES**

9. Consistent with the OECD Final Report, the Government will be focused on finding a way to appropriately balance competing policy priorities, including enhancing information available to the ATO to crack down on tax avoidance and avoiding unnecessary compliance burdens on taxpayers. A key priority will be ensuring that there is no unnecessary overlap with existing disclosure rules.

**Table 2: Key issues and the Government's preliminary positions**

	<b>OECD position</b>	<b>Initial views</b>
Issue 1. Who should be required to make disclosures under the Mandatory Disclosure Rules?	<p>The OECD recommends imposing a disclosure obligation on both the tax adviser and the taxpayer, or alternatively, imposing the primary obligation to disclose on either the tax adviser or the taxpayer.</p>	<p>The Government's initial view is that any Australian Mandatory Disclosure Rules should apply primarily to tax advisers who are involved in the design, distribution and management of aggressive tax arrangements.</p> <p>However, in limited circumstances, where the relevant tax adviser is offshore, the ATO may require disclosures to be made by the taxpayers.</p> <p>Legislation would provide a clear definition of targeted 'tax advisers' for the purposes of the Mandatory Disclosure rules.</p>
Issue 2. What aggressive tax arrangements would trigger the Mandatory Disclosure Rules?	<p>The OECD notes that countries will first need to decide what types of aggressive tax arrangements should be disclosed under the regime. This may be done by prescribing a mixture of specific and generic hallmarks which would trigger the disclosure requirement.</p> <p>Generic hallmarks target features that are common to aggressive tax arrangements, such as the requirement for confidentiality or the payment of a premium fee. Specific hallmarks target specific transactions or tax risks identified as areas of concern.</p> <p>The OECD notes that generic hallmarks may increase the amount of reportable transactions, potentially increasing costs for taxpayers, but also notes they may be a useful tool for capturing new and innovative transactions which specific hallmarks have difficulty in capturing.</p>	<p>The Government's initial view is that the ATO should have broad discretion (subject to the limits described below) in determining which aggressive tax arrangements would trigger the Mandatory Disclosure Rules. This will allow the ATO to respond quickly and flexibly to new market developments.</p> <p>It is anticipated that the ATO would identify the targeted aggressive tax arrangements in a manner similar to how it currently identifies aggressive tax arrangements that become subject to Taxpayer Alerts.</p> <p>However, to minimise unnecessary additional compliance costs, and ensure that the ATO receives highly targeted and useful information, there should also be clear guidelines set out in legislation around how the ATO's discretion should be exercised.</p>



	OECD position	Initial views
Issue 2. What aggressive tax arrangements would trigger the Mandatory Disclosure Rules? (continued)	<p>The OECD sees the use of generic hallmarks such as a premium fee, confidentiality and contractual protection as key in enabling tax authorities to detect and react quickly to new aggressive tax arrangements.</p> <p>Specific hallmarks allow tax administrations to target known or common areas of tax risk. The OECD concludes that specific hallmarks should reflect particular risks and issues in individual countries –and should therefore be left to each country to decide in the context of their own tax policy and enforcement priorities.</p>	<p>In particular, legislation should make it clear that Mandatory Disclosure Rules would only be triggered in relation to aggressive tax arrangements with specifically described features. This will ensure the disclosure rules can be limited to particular arrangements implemented by a specific targeted cohort, rather than imposing more general disclosure requirements on all taxpayers.</p> <p>Legislation should also make it clear those aggressive tax arrangements which have already been comprehensively disclosed through other disclosure tools or through private rulings should not be subject to further disclosure under Mandatory Disclosure Rules.</p>
Issue 3. What information should be required to be disclosed?	<p>The OECD notes that countries need to determine what information needs to be disclosed in relation to aggressive tax arrangements. This will involve striking a balance between ensuring the information is clear and useful and avoiding undue compliance burdens for taxpayers.</p>	<p>The Government’s initial view is that to minimise unnecessary additional compliance costs legislation should clearly specify the information that is required to be disclosed under Mandatory Disclosure Rules.</p> <p>There should also be a standard form provided by the ATO in relation to information that is required to be disclosed.</p>
Issue 4. When should disclosure be required by?	<p>The OECD notes that the purpose of the mandatory disclosure rules is to provide tax administrations with early information on aggressive tax arrangements and the users and tax advisers. The OECD concludes that the timing of disclosure is the key to achieving that goal.</p>	<p>The Government’s initial view is that, consistent with the OECD’s position, the ATO should have discretion to determine when tax advisers are required to disclose information by.</p> <p>However, it should not be earlier than 90 days from ATO publishing that a scheme is reportable. Further, there should be a mechanism for tax advisers to seek the ATO’s approval for extending the timeframe for making a disclosure.</p>

	OECD position	Initial views
Issue 5. What should happen after tax advisers comply with the Mandatory Disclosure Rules?	The OECD notes that countries might require users of aggressive tax arrangements to report a unique identification number on their return in order to identify them. Disclosure rules can also require tax advisers to provide client lists to the tax administration.	<p>The Government's initial view is that, consistent with the OECD's position, it is envisaged that all reported schemes will be assigned a reference number within 10 days of the date for required disclosure.</p> <p>The onus will be on tax advisers responsible for the distribution of the aggressive tax arrangements to provide the reference number to the end-users of the aggressive tax arrangements (as well as relevant intermediaries) within 10 days of receiving the reference number. The onus will be on the end-user taxpayers of the aggressive tax arrangements to report this reference number in their subsequent tax return, as a signal that they participated in the aggressive tax arrangements.</p> <p>To avoid duplication, the taxpayer would not be required to provide the same information as reported by the tax adviser.</p> <p>When a taxpayer has disclosed an arrangement, the ATO may take any of the following actions:</p> <ul style="list-style-type: none"> <li>• use the information to improve risk assessment systems;</li> <li>• review guidance and ruling products to determine suitability and contemporaneity;</li> <li>• undertake additional educational programs; and</li> <li>• undertake case reviews and audits where appropriate or necessary.</li> </ul>

	<b>OECD position</b>	<b>Initial views</b>
Issue 6. What should happen if tax advisers do not comply with the Mandatory Disclosure Rules?	The OECD recommends that non-compliance with disclosure should generally trigger penalties and other sanctions so as to encourage compliance with Mandatory Disclosure Rules.	The Government's initial view is that lateness or non-compliance with the disclosure obligation will be subject to monetary tax penalties on the tax adviser (or the taxpayer, depending on who the disclosure requirement is imposed on). Additional consultation will be required on the suitability of using existing penalty amounts.
Issue 7. Review mechanisms		The Government's initial view is that, to ensure that the Mandatory Disclosure Rules operate efficiently there should be an appropriate review mechanism for determining its effectiveness.

## IV. CONSULTATION QUESTIONS

10. Community views are sought on all aspects of this discussion paper.
11. In particular, views are sought on:
  - 11.1. How new Mandatory Disclosure Rules should be framed in the context of Australia's current disclosure rules, and in particular, how they should be targeted towards specific taxpayer cohorts to preclude duplication with existing rules.
  - 11.2. The Government's preliminary position that Mandatory Disclosure Rules should apply to tax advisers who are involved in the design, distribution and management of aggressive tax arrangements (Issue 1 in Table 2).
  - 11.3. The Government's preliminary position that broad discretion should be provided to the ATO in determining 'aggressive tax arrangements' that would trigger Mandatory Disclosure Rules. In particular, input is sought on how to design legislative guidelines on how this discretion should be exercised (Issue 2 in Table 2).
  - 11.4. The OECD Final Report's distinction between general and specific hallmarks in relation to aggressive tax arrangements that should trigger the Mandatory Disclosure Rules. In particular, views are sought on the advantages and disadvantages of general hallmarks as triggers for Mandatory Disclosure Rules (Issue 2 in Table 2).
  - 11.5. The Government's preliminary position that there should be clear legislative guidelines on the type of information that should be required to be disclosed under the Mandatory Disclosure Rules. In particular, views are sought on how these legislative guidelines should be designed (Issue 3 in Table 2).
  - 11.6. The Government's preliminary position that information should not be required earlier than 90 days of the publication of the ATO's statement. Views are also sought on the proposed mechanism for tax advisers seeking the ATO's approval for extending the timeframe for making a disclosure (Issue 4 in table 2).
  - 11.7. The Government's preliminary proposal on what should happen after tax advisers comply with the Mandatory Disclosure Rules (Issue 5 in table 2).
  - 11.8. The Government's preliminary proposal on what should happen if tax advisers do not comply with the Mandatory Disclosure Rules (Issue 6 in Table 2).
  - 11.9. The Government's preliminary position regarding review mechanisms following the disclosure of information under the Mandatory Disclosure Rules (Issue 7 in Table 2). What review mechanisms, if any, would be appropriate?