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Mr Marty Robinson
First Assistant Secretary
Corporate and International Tax Division
The Treasury
Parliament House
PARKES ACT 2600

By email: MNETaxIntegrity@treasury.gov.au

Dear Mr Robinson,

Government election commitments: Multinational tax integrity and enhanced tax transparency

The Corporate Tax Association (**CTA**) is the key representative body for 149 major companies in Australia on corporate tax issues. Further information about the CTA can be found on our website at www.corptax.com.au.

The CTA welcomes the opportunity to make a submission to Treasury on the *Government election commitments: Multinational tax integrity and enhanced tax transparency* consultation paper (**CP**). The CTA views this consultation as critical to ensure appropriate tax settings are in place to achieve the Government's stated objective of targeting activities deliberately designed to minimise tax, while also considering the need to attract and retain foreign capital and investment in Australia, limit potential additional compliance cost considerations for business, and continue to support genuine commercial activity.

We have attached as an Appendix to this letter responses to all questions raised in the CP. Responses were collated via three separately convened working groups of CTA members. Each group had more than 40 corporate participants, across all industry sectors.

In what follows we have also provided recommendations which are highlighted in **bold red** text.

A targeted, balanced, and staged response is needed

As an overarching observation, it is critical that any changes to the law that arise as a result of this consultation process are well targeted, commensurate with the risk and as "compliance light" as possible.

In relative terms, the net tax gap for large businesses (those over $250 million) is immaterial compared to other sectors of the economy and is supported by one of the most stringent corporate tax systems in the developed world. Given this, any

further multinational tax integrity and transparency rules should only apply to those with material international related party dealings and fully recognise the existing suite of tax integrity rules that are already a feature of our tax and transparency eco-system.

A concern often expressed to the CTA is Australia tends to bolt on incremental rules and additional compliance to an already robust system of law. Early and open engagement with those that operate within the system, as well as those that administer it, is crucial if such outcomes are to be avoided through this process.

Any change to Australia's tax integrity and transparency rules must be balanced and proportionate and ensure our rules are not seen or operate as a handbrake on international investment or perceptions of Australia not being business-friendly. Whilst we accept the government has made a policy decision to introduce these measures and the CP acknowledges the rules need to be targeted, we are conscious that the changes contemplated could easily become compliance heavy and susceptible to misinterpretation and dispute, if not implemented carefully.

In terms of the timing of the introduction of proposed changes, we make the following observations:

- the current economic environment is being significantly impacted by broader macroeconomic challenges, especially inflation. This is likely to have material unintended consequences across industry segments, particularly those which have been subjected to higher input costs. Consideration should be given as to whether a deferral of the start date of the proposed MNE interest limitation rules would be considered appropriate until more normal inflationary settings are present, and other cost inputs impacted by the current economic settings, subside. This will better meet the targeted intent of the policy, which is to address MNE gearing levels, as opposed to collecting increased tax payments from debt denials that are only present due to the broader macroeconomic challenges and that are outside of the MNE's control. A deferral should also help ensure that modelling of the budgetary impact of any changes ultimately made is more predictable, and that secondary legislative changes will not have to be considered should it become apparent that certain industry segments are severely impacted by the policy change.

- the transparency measures canvassed in the CP are broad-ranging. Drawing the many aspects of corporate transparency into a cohesive package will require time. As such, the CTA suggests pursuing a longer timeframe than those for the interest limitation and royalty changes. We also need to be mindful of the need to consider the impacts of other tax changes in the pipeline, notably the Pillars One and Two reforms of the OECD, and international transparency developments more broadly.

Scope of Government election commitments

Whilst we note the CP mentions in its preamble that "the principles outlined in the paper have not received Government approval, are not yet law and are seen as a guide as to how the rules might operate", the overall assessment of our members

on reading the detail in the CP was it appears to go beyond the scope of some of the election commitments and policy announcements in the Government's published policy document 'Labor's Plan to Ensure Multinationals Pay Their Fair Share of Tax' and the April 2022 media release which articulated the scope of the Government's multinational tax policy commitments.[1]

While the CTA welcomes Treasury's openness in consulting on various implementation options, some of the questions have limited relevance to the policy announcements made, but rather appear to address perceived integrity concerns without any detail around the basis of those concerns. Questions that fit under this category are, for obvious reasons, difficult to decipher and, in some instances, impossible to answer.

In what follows, we provide some specific observations which also provide some context to the responses made to the questions raised (and not raised) in the CP.

1. Multinational Enterprise (MNE) Interest Limitation Rules

The Government's media release which outlines its approach to changing Australia's thin cap rules notes "[w]e will ensure we are targeting tax minimisation and firms may be able to make further deductions if they can substantiate those under the arm's length test or worldwide gearing ratio test." (Our emphasis).[2]

This indicates the Government's policy position is that the arm's length test and worldwide gearing test are permissive and would not operate to restrict the fixed ratio tests. We support this position.

It is clear that the OECD recommended approach includes both a fixed ratio rule and a group ratio rule. These two features are not optional, although certain features of them can be. A de minimis rule, the carry forward of denied interest and unused interest capacity and interest carry backs are considered optional features. Better practice also allows other targeted rules to support general interest limitation rules and address specific risks.[3]

Whilst it is clear that the Government aims to introduce a fixed ratio of 30% of EBITDA, and a quasi-group ratio rule (with the possible retention of the optional worldwide gearing (**WWG**) test), the CP does not directly address three important policy matters:

a) the role of the 90% Australian Asset exclusion test;
b) the intended expansionary role of the arm's length test; and
c) the role of carry forward/carry back of denied interest deductions and carry forward of debt capacity.

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[1] See https://www.alp.org.au/policies/labors-plan-to-ensure-multinationals-pay-their-fair-share-of-tax and Labor's Plan to Ensure Multinationals Pay Their Fair Share of Tax | Policies | Australian Labor Party (alp.org.au)

[2] See Labor's Plan to Ensure Multinationals Pay Their Fair Share of Tax | Policies | Australian Labor Party (alp.org.au)

[3] See Figure 1.1 @ page 29 of the *OECD* report on *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments Action 4 – 2016 Update* (the OECD report)

(a) *The 90% Australian Asset Exclusion*

Currently, section 820-37 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) requires that an outward investor that is not also foreign controlled be excluded from the thin capitalisation regime where the sum of its average Australian assets and the average Australian assets of its associates represents 90% or more of the sum of its average total assets and the average total assets of its associates.

The CP is silent on whether this exclusion should be retained or removed in any revised interest limitation rule. We recommend the 90% rule be retained.

(b) *The arm's length (debt) test*

We note that Australia has an arm's length debt test (**ALDT**) under which the quantum of allowable debt is limited, but not the amount of interest deductible by a taxpayer (on the allowable debt). An arm's length test (**ALT**), as it is referred to by the OECD, applies the arm's length principle to the amount of debt deduction (that is, the interest rate multiplied by the quantum of debt)[4].

However, the limitation of allowable debt of a taxpayer under Australia's current ALDT is coupled with an arm's length principle applied to the terms of the debt interest, in particular in relation to the interest rate charged, under our transfer pricing rules. That is, Australia's current rules virtually include an ALT under which the quantum of debt and the interest payable to offshore parties are limited. The combination of the ALDT and transfer pricing rules should reach the same result as the ALT in practice and therefore effectively combats base erosion and profit shifting.

We note the CP states:

> "In considering the implementation approach to the fixed ratio rule, consideration should also be given to how the current arm's length test might be strengthened to prevent entities from opting into arrangements, that potentially take advantage of greater debt deductions than would be available under the fixed ratio rule. In this regard, the OECD guidance notes that "after introducing the best practice approach, a country may also continue to apply an arm's length test, withholding tax on interest, or rules to disallow a percentage of an entity's total interest expense, so long as these do not reduce the effectiveness of the best practice in tackling base erosion and profit shifting".[5]

Although paragraph 16 in the OECD Action 4 report infers an ALT can restrict the operation of the fixed (and group ratio) rules, this observation is made in the context of arm's length rules in some countries that would appear to allow domestic interest

[4] Refer para 12 on page 28 of the OECD report on *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments Action 4 – 2016 Update* (the OECD report)

[5] OECD report on *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments Action 4 – 2016 Update*, pg. 19 (the OECD report)

deductions for exempt income streams and domestic deductions for payments with equity-like features.[6]

We note paragraph 12 of the OECD report (which paragraph 16 acknowledges) outlines concerns with ALTs. It states:

> "An arm's length test requires consideration of an individual entity's circumstances, the amount of debt that the entity would be able to raise from third party lenders and the terms under which that debt could be borrowed. It allows a tax administration to focus on the particular commercial circumstances of an entity or a group but it can be resource intensive and time consuming for both taxpayers and tax administrations to apply. Also, because each entity is considered separately after arrangements are entered into, the outcomes of applying a rule can be uncertain, although this may be reduced through advance agreements with the tax administration. An advantage of an arm's length test is that it recognises that entities may have different levels of interest expense depending on their circumstances. However, some countries with experience of applying such an approach in practice expressed concerns over how effective it is in preventing base erosion and profit shifting, although it could be a useful complement to other rules (e.g. in pricing the interest income and expense of an entity, before applying interest limitation rules). In particular, countries have experience of groups structuring intragroup debt with equity-like features to justify interest payments significantly in excess of those the group actually incurs on its third party debt. Additionally, an arm's length test does not prevent an entity from claiming a deduction for interest expense which is used to fund investments in non-taxable assets or income streams, which is a base erosion risk specifically mentioned as a concern in the BEPS Action Plan (OECD, 2013)".

The apparent concern with some ALTs appears to be in countries that have rules that do not limit their ALT to the funding of domestic assets and/or do not have "substance over form" debt-equity rules. In contrast, Australia's ALDT does not allow deductible interest payments on non-taxable income streams as the test is limited to Australian businesses. Furthermore, debt-equity rules in Division 974 of ITAA 1997 ensure payments made on instruments with equity-like features are not deductible.

In summary, it is not the operation of the arm's length principle to the amount of in-substance debt deductions that is a concern for the BEPS agenda. It is the fact that tax rules in some jurisdictions are not restricting the ALT to the funding of domestic assets or in-substance interest payments. This is not the case with Australia's ALDT and debt-equity rules in place. Care should be taken to not conflate general concerns raised by the OECD report on the operation of ALTs in some countries with the operation of Australia's ALDT and debt-equity rules.

[6] For example, Canada currently allows domestic interest deductions for the generation of exempt income.

Moreover, and as noted above, the Government has specifically announced that its policy is to permit the ALDT to give rise to increased interest deductions above the 30% of EBITDA fixed ratio for groups that can meet the requisite tests.

Instead, consideration should be given to the fact that an ALT has the advantage of recognising that taxpayers may have different levels of interest expense depending on their circumstances[7]. An ALT should therefore be combined with the OECD's best practice approach[8]. In the case of Australia, this can most efficiently be achieved by maintaining the ALDT in combination with our current transfer pricing principles. Retaining these features will in particular allow taxpayers in capital-heavy industries (e.g. infrastructure and infrastructure-like businesses), where it is common practice to operate with higher debt to equity ratios than in the majority of other industries, to maintain justified and acceptable gearing ratios, as it was intended with the introduction of the ALDT[9].

We note Australia's ALDT has previously been subject to review by the Board of Taxation (**BoT**) which resulted in various recommendations (not all of which have been implemented). The report highlighted the importance of the ALDT describing it as "… the central plank of the thin capitalisation rules, which aim to allow debt deductions only for commercially justifiable levels of debt"[10] (our emphasis). This is compared to "The 'safe harbour' and the 'worldwide gearing ratio' tests [which] are the shortcut for most taxpayers wanting to establish that they are claiming reasonable levels of debt deduction at arm's length[11]".

Like the existing 'safe harbour' and the 'worldwide gearing ratio', the OECD recommended approach of a fixed ratio and a group ratio rule are also essentially a shortcut for reasonable levels of debt deductions. In this respect, they do not take account of different taxpayers' commercial circumstances. Therefore, notwithstanding the potential inclusion of interest/capacity carry forward/back provisions (which we would strongly recommend), absent the retention of a "permissive-style" ALDT test, taxpayers may be adversely (and inequitably) impacted. This view was also reached by the BoT in 2014:

> … assuming that it is desirable to provide certainty and not to impose tax-driven disincentives for such projects in Australia, the ALDT provides an appropriate method for assessing whether the Australian business of a multinational entity is appropriately capitalised. One of the advantages is that the ALDT generally reflects the economic circumstances of particular industries or businesses that operate with higher gearing ratios than those allowed by the safe harbour rules.[12]

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[7] Refer para 12 on page 24 of the OECD report on *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments Action 4 – 2016 Update* (the OECD report)
[8] Refer para 15 on page 25 of the OECD report on *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments Action 4 – 2016 Update* (the OECD report)
[9] Para 10.2 and para 10.4 of the Explanatory Memorandum to the New Business Tax System (thin Capitalisation) Bill 2001
[10] Page 5, Review of Thin Capitalisation Arm's Length Debt Test, The Board of Taxation, December 2014
[11] Page 5, Review of Thin Capitalisation Arm's Length Debt Test, The Board of Taxation, December 2014
[12] Para 3.4, Page 17, Review of Thin Capitalisation Arm's Length Debt Test, The Board of Taxation, December 2014

In general, the ALDT is often referred to by large-scale projects undertaken by capital-intensive industries and, in more recent times, these projects may include renewable energy projects as well as other projects which support the Government's climate change objectives.

On this basis, together with the reasons set out above, any ALDT/ALT should complement the fixed ratio provisions as a permissive/expansionary (as opposed to restrictive) measure, particularly if carry forward rules are not part of the policy design.

For completeness, it is also highlighted that the BoT's review of the ALDT in 2014 provided several observations and recommendations that may reduce compliance costs associated with adopting the ALDT.

Taxpayers taking advantage of the ALDT being an expansion of the fixed ratio rules

The ALDT was, according to the explanatory memorandum to the thin cap rules, introduced so that "[t]*axpayers will be able to use this test where they fail the safe harbour test but their gearing could otherwise be justified or acceptable*"[13].

We note a considerable proportion of the CP is focused on discussing integrity concerns with firms potentially taking advantage of an expansionary ALDT. With respect and referring again to the BoT comments on the ALDT, if the ALT is appropriately justifying a deduction for an amount of interest expense on an arm's length basis that is in excess of the fixed ratios, that should achieve the policy intent (unless the policy concern is that the universally accepted arm's length principle is wrong). Any concerns with increasing levels of interest expense by debt dumping or debt creation can be dealt with and, in fact, are effectively being dealt with, via existing anti-avoidance and transfer pricing rules.[14]

(c) *The role of carry forward/carry back of denied interest deductions and interest capacity.*

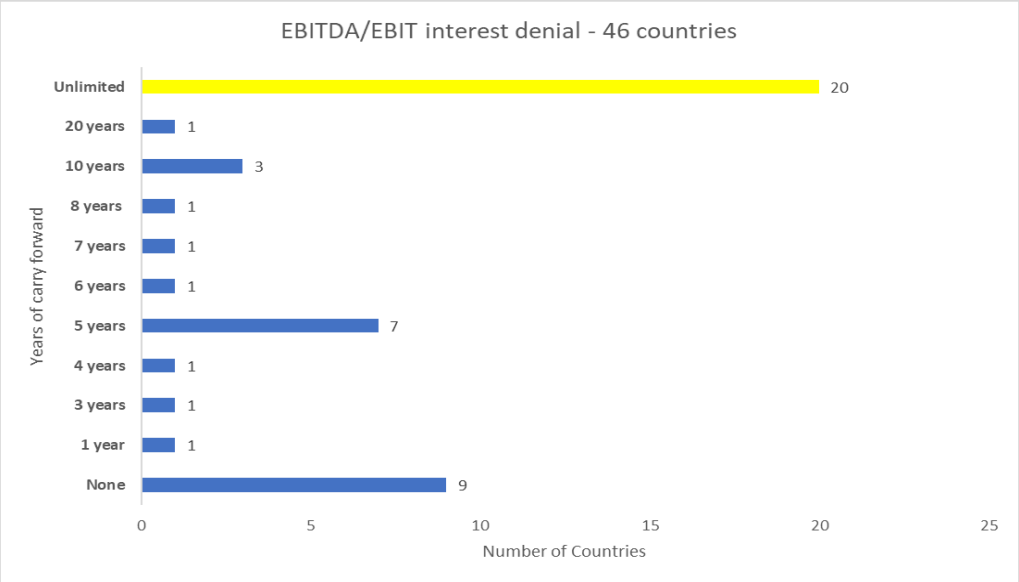
In our view, the combination of the fixed ratio and group ratio rules which permit a company to exceed that ratio if their group gearing ratio is higher, together with carry forward treatment of denied interest, are crucial complementary design elements of the interest limitation rules.

As noted in a paper forwarded by the CTA to the Treasurer in July 2022, our analysis of the 44 countries with EBITDA regimes (and 2 with EBIT based tests), shows 43% have indefinite carry forward of denied interest (and in some cases carry forward of excess interest capacity). Moreover, 74% have a carry forward period of at least 5 years for denied interest.

[13] Para 10.2 of the Explanatory Memorandum to the New Business Tax System (thin Capitalisation) Bill 2001

[14] The ATO acknowledge this at Key compliance risks for large corporate groups | Australian Taxation Office (ato.gov.au)

The following diagram shows the spread of interest carry forward rules for the 44 countries with EBITDA based rules and 2 with EBIT based rules (US and Cambodia have indefinite carry forward rules).



We note that in the 9 countries (20%) where there is no carry forward of denied interest, 6 countries (67%) apply EBITDA tests to related party debt only. We also note the average corporate tax rate for these countries is 20%. Where interest denial is calculated by reference to all debt, the average corporate tax rate is 19%.

	Tax rate	Related Party Debt only
Albania	15%	Yes
Bosnia	10%	Yes
Ecuador	25%	Yes
Iceland	20%	No
Kenya	30%	Yes
Korea	25%	Yes
Latvia	20%	No
Slovak Republic	21%	Yes
Ukraine	18%	No
Average overall	20%	
Average (related party only)	21%	
Average (all debt)	19%	

Whilst 20 countries (43%) use unlimited carry forward rules, a further 4 countries (9%) adopt a long lead time for carry forwards of at least 10 years. Canada, which has a commodity export-orientated economy very similar to Australia, has proposed 20 year carry forward and 3 year carry back rules. EU model rules indicate a 3 year carry back may also be adopted.

What this analysis tells us is that in the vast majority of jurisdictions that have implemented EBITDA regimes, carry forward/carry back rules are a fundamental feature of interest limitation rules in practice. The absence of any mention in the CP of carry forward/carry back of denied interest and interest capacity is, therefore, a significant and understandable concern. The effect of Australia's 30% corporate rate, if coupled with no carry forward of denied interest, would make any interest

limitation rules the most onerous in the world if the fixed and group ratio thresholds are breached and could potentially lead to triple taxation in circumstances where both the Australian debtor and offshore lender are in a tax loss position and Australian interest withholding tax applies. Such a regime would adversely impact:

- Start-ups (including the renewable energy sector) and new greenfield investments with low initial EBITDA or volatile EBITDA;
- Industries with volatile commodity price movements such as energy, commodities and insurance, particularly where earnings are also subject to significant foreign currency movements;
- Infrastructure projects and resources investments with long lead times between commencement of a project and earnings being generated, having capitalised interest during the construction phase;
- Impact labour productivity (and real wage growth) if reduced capital investment is an outcome.

The nature of these businesses means that they require ongoing debt funding and may struggle to accurately predict earnings, at least beyond the short term. It should not be assumed funding will then come in the form of equity as interest limitation rules apply to all debt, not solely related party debt. The Government's pre-election policy announcement targeted the creation of "artificial debts". Debts incurred in the circumstances above are not "artificial" or the product of sharp practice – they reflect the economic reality of each industry and the degree of maturity of each business, the relative flexibility of debt funding and how return on debt instruments can be made, even if accounting profits do not exist. It is anomalous to punish such MNEs or those with a poor trading performance in a particular year by potentially denying interest deductions. This compounds the challenges to business without addressing the concern of "artificial debts".

The simplest way (and our recommendation) to deal with concerns around the volatility of EBITDA and start-ups would be to adopt the most commonly accepted unlimited carry forward regimes that apply in the EU, US and the UK.

In passing, we note that under proposed Canadian rules and existing UK rules (under which an ALT may be a cap on the fixed ratio outcomes), any denied interest under the ALT is also carried forward. For example, if a firm incurred interest expense of $100 and the application of the ALT resulted in allowable interest of $60, but the 30% fixed ratio would result in a potential deductible interest amount of $80, $60 is deductible interest in the relevant year and $40 ($100 less the $60 ALT amount) is carried forward (not $20 being denied and only $20 carry forward).

2. Denying MNEs deductions for payments relating to intangibles and royalties paid to low or no tax jurisdictions

We understand the purpose of this proposal is to introduce a new rule limiting an MNE's ability to claim tax deductions for payments relating to intangibles and royalties which can lead to insufficient tax being paid by way of shifting profits to low or no tax jurisdictions.

The CP notes the "fast growth of the digital economy has exacerbated these practices, with an increasing number of MNEs structuring their ownership of intangibles through low tax jurisdictions, giving rise to integrity risks to Australia's tax base." We are not aware of the numbers (or the increasing number) of MNEs structuring through low tax jurisdictions and how much tax is at risk. It is submitted some indication of the numbers of such practices and their potential cost to the revenue would help better inform the debate for the need for additional integrity rules over the current suite of integrity measures.

We note the scope of the original pre-election policy announcement[15] was:

> **Tax havens integrity**
>
> Some multinationals "treaty shop" to funnel payments into tax havens with low tax rates.
>
> We will limit the ability of large multinationals to abuse Australia's tax treaties while holding intellectual property in tax havens from 1 July 2023.
>
> A tax deduction would be denied for payments for the use of intellectual property when they are paid to a jurisdiction where they don't pay sufficient tax.
>
> This measure would only apply to large global multinationals and is related to measures put in place in the UK, US and Netherlands.

In essence, the original policy announcement targets MNEs deliberately treaty shopping by moving intellectual property to 'tax havens' with low tax rates to reduce the overall amount of tax paid by the group. It appears from the 5 August 2022 media release that accompanied the release of the CP that the CP expands the government's pre-election commitment to include within its scope what are called embedded royalties and removes the reference to tax havens.[16]

Proposal based on Taxpayer Alerts

The CP heavily relies on matters contained in two Taxpayer Alerts (TAs) focused on non-arm's length arrangements connected with developing, enhancing and exploiting intangible assets (TA 2020/1) and mischaracterising payments connected with intangible assets (TA 2018/2). While the ATO does not disclose how many taxpayers have to engage in a particular activity before it issues a Taxpayer Alert, we can say these are extreme examples of taxpayer behaviour.

We note that the Australian Taxation Office has a broad range of measures at its disposal to counter arrangements of the type outlined in the TAs above. These measures include transfer pricing reconstruction provisions, specific and general anti-avoidance provisions, and treaty shopping provisions.

The CP appears to imply that a bright line test is required in addition to these targeted reconstruction/anti-avoidance provisions. The danger is that such a bright

[15] https://www.alp.org.au/policies/labors-plan-to-ensure-multinationals-pay-their-fair-share-of-tax

[16] See Public consultation begins on Multinational Tax Integrity and Transparency | Treasury Ministers

line test is so broadly defined that it applies to genuine commercial arrangements that do not involve artificially moving intellectual property to low tax jurisdictions, thereby hampering what would otherwise be ordinary commercial decisions. This is best illustrated by the fact that the only carve out under the bright line test is where the "insufficient tax" test is not satisfied under one of the options discussed. One of the alternatives contemplated for the "insufficient tax" test is where payments are made to jurisdictions with a corporate tax rate of less than 24%, applying the sufficient foreign tax test in the Diverted Profits Tax (**DPT**) provisions. This would cover a broad range of payments without the benefit of the other carve-outs that appear in the DPT provisions. Such a test would also go well beyond the international precedents referred to in the CP.

There is also a danger that such a bright line test introduces a significant compliance burden on taxpayers which is disproportionate to the perceived mischief that the Government is looking to counter. This is best illustrated by the fact that taxpayers making payments for the purchase of goods or services from unrelated third parties could be required to understand how those payments are taxed in the hands of the payee and whether there are royalties paid further up the value chain in the payee's group.

The risk of double taxation remains high, particularly if Australia implements regimes not consistent with other jurisdictions. Foreign jurisdictions are unlikely to credit royalty withholding tax on arrangements where Australia has attempted to bifurcate a payment that is not a standard royalty arrangement to which bilateral double tax arrangements envisage. This negatively impacts the competitiveness of investments within Australia.

It is unclear whether in this instance a separate rule is really necessary. Our concern is that wholly compliant taxpayers paying for goods or services will be denied deductions where the payments are not in any way related to structures where intellectual property has been moved to low tax jurisdictions purely to reduce overall tax.

We suggest that a more open, transparent discussion around the ATO's concerns with existing structures, including whether the existing laws available to it are proving to be ineffective, would be a more sensible option.

A New Integrity Rule - Overseas Examples

The CP notes how existing integrity rules can target the use of royalty and other intangibles payments going offshore[17]. It is unclear what a new rule targeting the deductibility of these payments would achieve over and above what the existing integrity rules already do. In our view, a blunt non-deductibility rule, without additional restrictions based off purpose and substance, is overreach in an area of risk that remains largely undefined by the ATO.

We note reference is made in the original announcement to specific measures in place in the US, UK, and the Netherlands. We note:

[17] Refer pp 11-12 of the consultation paper

- The US BEAT and GILTI rules are very specific to the US tax system and are not a specific 'deduction denial' rule.
- The UK and Netherlands regimes are not specific 'deduction denial' rules – they impose a higher withholding tax rate and only apply to non-treaty countries. Australia already does the same thing for royalties paid to non-treaty countries.
- The German 'royalty barrier' rule is a 'deduction denial' rule and only applies if the preferential tax regime is not compliant with BEPS Action 5.

These are examples of targeted and narrowly defined integrity rules.

If, after re-evaluating whether the existing rules are fit for purpose, the Government decides to move forward with an additional integrity rule, we recommend that such a rule is narrowly defined, clearly targeted and easy to apply. Extensive further consultation will be required to ensure that any such rule does not produce inadvertent outcomes that could adversely impact legitimate commercial arrangements.

Patent Boxes

BEPS Action 5 provides a minimum standard on harmful tax practices, part of which involves the OECD policing any preferential tax regimes a country may put in place[18]. Numerous jurisdictions have patent box regimes that comply with BEPS Action 5. It is incorrect to say that some patent box regimes that may be non-compliant or low or not taxed would necessarily 'encourage' aggressive tax planning by virtue of their existence. A compliant regime where there is economic substance is acceptable tax practice, not "aggressive"[19]. The minor possibility of taxpayers offshoring IP to non-Action 5 compliant regimes does not, in our view, necessitate the need for a broad rule denying a tax deduction in Australia. There should not be any need for Australia to develop its own rules that go beyond the scope of the work of the OECD. The Government should have confidence that the OECD would identify any harmful or non-compliant tax regimes and discourage their existence.

If the Government is concerned about the ability of the existing framework of integrity rules to appropriately address a perceived integrity concern with intangible migrations and embedded royalties, we would urge the Government to consider referring the matter to the BoT to properly investigate this matter, or at least make a review by the BoT in three years a condition of the introduction of any rules.

[18] Refer to the latest results of the OECD combatting harmful tax practices as at 27 July 2022 (https://www.oecd.org/tax/beps/new-results-show-progress-continues-in-combatting-harmful-tax-practices.htm)

[19] Refer to the comment on p12

3. Multinational tax transparency

To set the scene for our comments, we reproduce the relevant excerpts from the Government's original pre-election policy announcement[20] on the scope of the transparency announcements:

> **Public reporting of tax information on a country-by-country basis**
>
> Labor will require public release of high-level data on how much tax large multinational firms pay in the jurisdictions they operate in, alongside the number of employees working there.
>
> Some firms (such as BHP and Rio Tinto) already provide this kind of information on a voluntary basis.
>
> This will be good for investors and the market as businesses are more transparent on their arrangements.
>
> Labor would consult on the specific details that firms operating in Australia would have to provide as part of consultations on the legislation.
>
> **Mandatory reporting of tax haven exposure to shareholders**
>
> Shareholders have a right to fully understand the risks their investments are taking in relation to their tax structuring.
>
> Companies would be required to disclose to shareholders as a "Material Tax Risk" if the company is doing business in a jurisdiction with a tax rate below the global minimum (15 per cent).
>
> **Requiring government tenderers to disclose their country of tax domicile**
>
> Labor will level the playing field by bringing in a Fair Go Procurement Framework requiring those that gain government contracts to pay their fair share of tax. All firms tendering for Australian Government contracts worth more than $200,000 should also state their country of domicile for tax purposes.

Some Initial Observations

The CTA is a strong advocate for well-targeted and informative public tax transparency. We would welcome changes that require the publishing of information that informs and does not mislead the public. Media and political responses to the last seven ATO published Corporate Tax Transparency Reports have shown how tax numbers can be intentionally misused and unintentionally misunderstood.

Whilst most of the CP deals with corporate tax transparency to the public, it is the CTA's view that the BoT should have a pivotal role in any proposed changes to public

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20 https://www.alp.org.au/policies/labors-plan-to-ensure-multinationals-pay-their-fair-share-of-tax

transparency disclosures large corporates and the ATO are required to make, and that the implementation of any changes commence no earlier than income years commencing on or after 1 July 2024 (following the start date of the EU CbC Reporting Directive[21]).

In 2019, the BoT undertook a post-implementation review of the Voluntary Tax Transparency Code[22] (**VTTC**). In so doing, it considered developments that had occurred in the tax transparency landscape at both the local and global level and how this data reconciles with data the ATO publishes in its Corporate Tax Transparency report.

The outcomes of this report have not been publicly released. In particular, it is not known whether the BoT supported making the VTTC mandatory or what changes were considered (if any).

As such, it is difficult to understand what concerns existed in 2019 (if any) and what changes were recommended and thus if further changes are warranted in 2022 and beyond.

It is also unclear to CTA members whether there is a strong demand from the community for additional tax transparency from MNEs beyond the information already disclosed, or whether 'community demand' could already be met by simply presenting information already disclosed in a more user-friendly way. If VTTC website 'hits' are a measure of interest, the level of community interest is nominal. The CTA canvassed its members on the number of "hits" to existing transparency reports and they are not large. We would be happy to share this information if requested.

The CTA recommends that the BoT revisits its post-implementation review from 2019 in light of recent developments and finalises the outcomes before further decisions on the VTTC and its voluntary nature are made.

Detailed Observations

Each aspect of the multinational tax transparency proposals canvassed in the CP is discussed below.

a) ATO Tax Transparency Reporting

The information included in the ATO Corporate Tax Transparency report, whilst providing some public tax transparency of large corporate tax information, has been subject to misuse and misinterpretation. This is despite the ATO (and others such as the CTA and many corporates) going to considerable lengths in explaining what the "three numbers" (total revenue, taxable income, and tax paid) do and don't mean, via supporting commentary and publications. The concern expressed by many

[21] DIRECTIVE (EU) 2021/2101 amending Directive 2013/34/EU - https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2021:429:FULL&from=EN

[22] Refer to https://taxboard.gov.au/consultation/post-implementation-review-of-the-voluntary-tax-transparency-code

corporates is the three numbers don't provide sufficient context to explain tax performance despite the ATO and others (including corporates themselves) explaining what they mean. Suggestions that taxpayers should fill the transparency void and explain their numbers via their own tax transparency reporting whilst superficially appealing, is not realistic or practical. The three numbers are published by the ATO at least 12 months later than taxpayers' tax transparency reporting and/or financial reports. These sorts of complications add to community confusion rather than making tax performance information more transparent and informative.

To deal with these issues, the CTA considers that additional information possibly including (but not necessarily limited to) accounting profit/losses, carry forward and current year income tax losses and adjusted taxable income for franked dividends should also be disclosed in addition to the three numbers (and PRRT payable for relevant taxpayers). This additional information would give a fuller picture of the reporting entity's financial position relative to tax paid.

Again, we recommend the BoT have involvement in considering the type of ATO collated tax data that should be made public to ensure it is fit for purpose.

b) Public Reporting of Tax Information on a CbC basis

Full CbC reporting is currently provided to the ATO (and other tax authorities) on a confidential basis as a requirement of BEPS Action 13. Public disclosure of all CbC information is a large leap from the current confidential disclosure requirements. Given public disclosures already made by MNEs and the ATO, additional disclosures may serve to confuse the wider community about the tax status of MNEs rather than provide additional colour and clarification to information already disclosed.

In terms of the kind of data that could be disclosed, our view is that high-level data only should be included.

In our view, the EU Directive requiring the publication of certain CbC data by EU member states appears to strike an appropriate balance for minimum reporting standards. We note that this only includes limited information for EU countries and certain "blacklisted" jurisdictions.

In our view, the Global Reporting Initiative (GRI) standard is too detailed and requires implementation of the wider suite of GRI standards to be effective. We suggest firms could voluntarily opt for higher reporting standards should they wish to meet GRI reporting standards as part of their wider ESG reporting.

In scope entities

In our view, entities in the scope of the measure should be limited to significant global entities with offshore operations that are to report for CbC reporting purposes as defined in Subdiv 815-E of the ITAA 1997 or have General Purpose Financial Statement reporting obligations or both.

A de minimis threshold amount for related party disclosures could also be considered.

Timing of Public CbC Reporting

Given the impending introduction of Pillars One and Two and the implementation of EU CbC standards, we would encourage the Government to defer the introduction of limited public CbC reporting requirements. The introduction of Pillar Two will undoubtedly impose additional compliance on MNEs.

Any CbC reporting should be deferred until the year commencing on or after 1 July 2024 at the earliest.

c) Mandating the Voluntary Tax Transparency Code

The CTA has always strongly encouraged its members to disclose information under the VTTC and has several publications on its website contextualising the transparency data published annually by the ATO.

As noted above, the BoT's 2019 report into the VTTC has not been published. The view of the BoT prior to the time of the 2019 review was that the VTTC should not be made mandatory, as it will then simply become a compliance exercise which would not require any input or deliberation from the corporate's board.

Given the status of the VTTC in terms of the BoT's views remain unknown, the CTA recommends considering using mandatory EU style CBC reporting by MNEs (not the ATO) as the minimum standard to replace the VTTC. Should taxpayers wish or be able to, they could voluntarily report incremental information contained in the current VTTC or GRI standard. The considerable amount of reporting overlap between the VTTC and EU style MNE reporting, and the opportunities such an approach might provide for alignment with other disclosure regimes, in our view makes this the preferred option.

In regard to whether the VTTC is the place to include the publicly reported CbC information, we consider that if a decision is made to legislate a mandatory CbC requirement, this should be legislated separately. This is particularly as no announcement has been made by the Government to mandate the VTTC.

Should the Government proceed with this proposal, we recommend the matter be referred to the BoT to consult on its merits.

d) Mandatory reporting of material tax risk to shareholders

No definition of 'material tax risk' is provided in the CP so it is not clear what additional tax risks are sought to be disclosed beyond what is already required to be disclosed by local and international accounting standards for uncertain tax positions (such as in AASB 112 and Accounting Interpretation 23) or the international accounting standards counterpart. It is also not clear if what is being suggested is more than the requirements of accounting standards or whether the quantum of any material tax risk is to be disclosed or rather a narrative of it, or both.

As the CP notes at page 27, there is currently no globally accepted definition of a tax haven. However, the EU have developed a model of non-cooperative jurisdictions that we suggest could be an appropriate model to consider.[23]

In our view utilising the Pillar Two global minimum tax rate of 15% might have superficial appeal, but having a definition tied to Pillar Two type calculations is misleading as they ignore the full effect of deferred tax accounting on effective tax rates and legitimate and substantive business activity that may be in start-up, development or loss phase in countries with high headline rates.

We also note the alternative proposal to rely on "certain" (yet to be defined) ATO Practical Compliance Guidelines (PCG) and require an MNE to self-assess as a high-risk taxpayer. We note a PCG is an ATO risk assessment tool, not law and has no monetary thresholds nor are they limited to the counterparty being in a tax haven (or non-cooperative regime). A PCG indicates where risk may exist, thereby helping the ATO to determine where to devote its resources. There are many instances where a taxpayer that carries a high PCG risk rating has been able to, on review by the ATO, demonstrate an absence of actual tax risk associated with the relevant arrangement. It should be noted a tax risk is not a tax exposure. For these reasons, they are an inappropriate tool for public disclosure purposes.

Consideration of how such disclosure rules would apply to firms that are not listed in Australia would also need to be considered.

We would recommend that if material tax risk disclosures are seen as required beyond current accounting standards, that they should are limited to material tax exposures in non-cooperative jurisdictions (equivalent to the EU list of non-cooperative jurisdictions).

Requiring government tenderers to disclose their country of tax domicile

We have no specific comments on the proposal other than those noted in the responses included in the attached Appendix.

* * * * *

Should you have any questions in relation to the above, please do not hesitate to contact me on 0402 471 973, Paul Suppree on 0408 185 050 or Stephanie Caredes on 0408 028 196.

Yours sincerely,

Michelle de Niese
Executive Director

[23] See EU list of non-cooperative jurisdictions for tax purposes - Consilium (europa.eu)

Appendix – Response to all consultation questions

Appendix on
Consultation questior

MNE Tax Integrity and Transparency Consultation Paper

Q No.	Question	Comments
	Part 1: Strengthening Australia's multinational tax avoidance and tax transparency rules	
1	Considering the policy intent of limiting debt deductions to genuinely commercial amounts, should the fixed ratio rule rely on accounting or tax figures? On what basis do you say this?	Accounting EBITDA is an understood commercial concept and it contains audited figures in listed entity financial accounts at the group level. Issues would arise on certain IFRS accounting disclosures (such as accounting for financial leases) and the requirement to mark to market (which are not depreciation and amortisation). Accounting figures are also impacted by Impairments, Fair Value adjustments and other non-cash adjustments. Unless they are carved out of the test, accounting EBITDA would not be an appropriate measure. Tax in an accounting based test could be tax expense or current tax, normally defaulting to tax expense (tax on profit after permanent differences). Depending on how it is calculated, a Tax EBITDA should result in excluding non-cash accounting adjustments. A Tax EBITDA test should presumably be tax paid (referable to the relevant year), not tax paid in that year. Clarification is required on the impact of carry forward tax losses in a Tax EBITDA test . Given it is a year on year test, they should be ignored or as a minimum be tax effected. Tax EBITDA would somehow need to be limited to Australian EBITDA and somehow deal with dividends (including exempt, franked and unfranked. Pillar Two adopts an accounting basis, and consideration should be given to these interactions. On balance, a yearly Tax EBITDA (ignoring carry forward losses) using current tax paid referable to the year in question is considered the better option.
2	Will the move to a fixed ratio based on earnings impose additional compliance costs on taxpayers? Can these costs be quantified?	Very likely. Any change will involve additional initial compliance costs on taxpayers and the ATO. The current safe harbour is widely used and understood. Although the fixed ratios will have initial compliance costs, the impact of the ALDT if it is seen as a cap, will involve a more extensive compilation of evidence and transfer pricing analysis for all impacted taxpayers therefore increasing compliance costs. This may involve large external fees, depending on business size, as well as verification costs by the ATO at least for those in the Top 100 or Top 1000. The PCG on the ALDT may require rework (and possibly some form of codification or simple bright line metrics to best reflect an arms's length range).
3	What factors influence an entity's current decision to use the safe harbour test (as opposed to the arm's length debt test or the worldwide gearing test)?	Ease of use in the calculation of the fixed ratio rule. It is straightforward. Other options are generally only used when the fixed ratio results in interest denial, notwithstanding that the quantum of debt is arm's length/commercial. This may be the case for example where a business is in the 'start up' phase or there are temporary challenging trading conditions which cause an accounting impairment of assets.
4	Are there specific types of entities currently using the safe harbour test that would be affected by the introduction of a fixed ratio (earnings based) rule? If so, how would they be affected?	* Entities with volatile earnings, such as commodity-based earnings and energy markets earnings. * Start-ups, new renewables ventures requiring debt funding/foreign investment, large infrastructure projects that are not consolidated with wider balance sheets. *Insurers as they are already highly regulated. The fixed ratio rule (and group ratio rule) is unlikely to provide protection against BEPS risks given insurers typically experience net interest income. It is preferable that the existing thin capitalisation rules continue to apply to insurers as per the caveat to BEPS Action 4, no material risks are likely to be identified relevant to insurers. * A fixed ratio (earnings based) rule can be detrimental to capital intensive industries, such as property, which require significant capital outlays upfront (with minimal return in early years) and are more highly leveraged compared to other corporates (due to the physical nature of security available to third party lenders - reflected in higher loan-to-asset ratios and lower interest rate cover ratios). Denial of interest deductions will increase the cost of construction/development projects and reduce Australia's ability to attract international capital for investment in the property sector.
5	Should there be any changes to the existing thin capitalisation rules applicable to financial entities and authorised deposit-taking institutions?	Amend current rules to include APRA-regulated insurers
6	Would the existing $2 million de minimis threshold be an appropriate threshold for the fixed ratio rule, to exclude low-risk entities?	The EU directive (EU Anti-Tax Avoidance Directive 2016/1164 (ATAD)) adopts a €3 million ($A4.5 million equivalent) "exceeding borrowing costs" (i.e. net interest expense) de minimis rule. This has been adopted in most jurisdictions. Australia's current rules adopted a $2 million debt deduction threshold in 2014. The average annual CPI increase since 2014 is around 2% per annum. Indexing $2 million to March 2022 would increase the threshold to approximately $2.5 million. A higher threshold is appropriate, particularly for Australian outbound companies. Adopting a $3 million net interest expense threshold would reflect an appropriate balance. In addition, it is very important that the ≥90% Australian asset exemption should be retained. This ensures that Australian businesses with incidental offshore interests are not brought into the interest restriction net.
7	Are there specific sectors more likely to experience earnings volatility that may cause entities to explore using one of the alternative tests instead (e.g. arm's length test)?	Start ups (including in the renewable energy sector) will have low initial EBITDA, or volatile EBITDA. Greenfield resource sector and infrastructure projects can have long lead times between commencement of a project and earnings being generated, having capitalised interest during construction phase. Industries with volatile commodity price movements such as energy, commodities and insurance, where earnings may also be subject to significant foreign currency movements. The property sector is subject to cyclical trends and EBITDA is low in the development phase. In our view carry forwards of denied interest and interest capacity are vital. Tax policies should align and not impede other Government policies like energy transition policy.

Q No.	Question	Comments
8	What features of fixed ratio (earnings-based) rules in other jurisdictions are most significant (relevant) for implementing a fixed ratio rule in the Australian context?	Unlimited carry forward of denied interest deductions and 5 year carry forward of interest capacity. US: Real property trade or business election. UK: Public benefit infrastructure exemption which includes 'property rental' businesses.
9	If the Government adopts an earnings-based group ratio rule to complement the fixed ratio rule, should the existing worldwide gearing test (based on a debt-to-equity ratio) be repealed? If not, why?	There would be no need for the existing WWG test if adopting a group ratio rule with allowances for upward adjustments if a debt to equity calculation was used in the group rule. **Should an earnings based group rule be used,** the WWG test should remain. Having both an earnings based group rule and a debt to equity WWG rule provides additional certainty for those with volatile earnings and/or volatile asset values.
10	How should net third-party interest expense be calculated in applying the group ratio rule (as part of the fixed ratio rule) e.g. what accounting values should be used?	Should follow accounting treatment including the treatment of financial hedges.
11	What types of entities currently use the existing worldwide group test?	Insurers. ATO should have this data via IDS submissions. It would be useful for the ATO to share that high level , so we can make informed comments.
12	Would introducing a fixed ratio rule encourage entities not currently using the arm's length debt test to shift to an arm's length test? If so, why? Are there specific sectors where this type of behavioural response is likely to be more evident?	This is very much dependent on the impact of a fixed ratio rule (and group ratio) on a case by case basis and the existence of carry forward rules and levels of earnings volatility. With unlimited carry forwards, we would not consider the ALDT would be used much more than currently. In the absence of carry forward of denied interest expense, companies would seek to use the fallback tests. The ALDT will be critical for entities that fail the EBITDA test due to earnings volatility or accounting-based adjustments (impairment/Fair Value adjustments) where EBITDA is based on accounting rather than tax.
13	For entities currently using the arm's length debt test, would replacing the current 'standalone entity' rule to require consideration of the entity being a member of a worldwide group reduce compliance costs? If not, why?	Please refer to the recommendations in the Board of Tax paper on the review of the ALDT.
14	To what extent does the current arm's length debt test permit BEPS practices to occur? What changes should be made to ensure that an arm's length test complements the fixed ratio rule?	We do not agree with the assumption that the arm's length debt test and appropriately priced interest on that debt (in accordance with current transfer pricing principles and anti-avoidance measures) is a BEPS concern. ALDT is already a robust test. If anything it requires modifications to make it a more commercial test, ie recognition of parent company guarantees for project finance. To complement the fixed ratio rule, the recommendations in the Board of Tax report on the ALDT on implicit support should be implemented as part of any amendment to the current rules. We note that the future availability of the ALDT will be critical for taxpayers in industries that currently rely on the ALDT (for example capital intensive industries with historically higher gearing ratios than other industries, like infrastructure).
15	How should the different integrity concerns posed by external (third-party) debt and related-party debt be reflected in any changes to the arm's length debt test?	ATO PCG 2020/7 already addresses this.
16	Would differentiating between external (third-party) debt and related-party debt simplify the operation of the test?	Yes
17	Would additional limitations be required to prevent any unintended consequences, such as 'debt dumping' or other debt-creation integrity concerns?	No. Existing rules (transfer pricing, GAAR) are sufficient. We are not aware of any other jurisdiction applying, or seeing the need for additional rules.
18	Are there any other changes (policy or administrative) that could be made to the arm's length debt test, to keep in line with the Government's commitment to limit interest deductions? If so, what would be a reasonable transition period to introduce these changes?	The governments commitment in its April policy statement is for the ALDT to enable higher (not lower) levels of deductible interest expense when applying the ALDT. If the ALDT is seen as some sort of cap, then carry forward rules must be implemented as part of any legislative design. If concerns exist, then a review of the application of the rules, in say 3 years, could be considered.
	Part 2: Denying MNEs deductions for payments relating to intangibles and royalties paid to low or no tax jurisdictions	
1	Do you consider this policy should apply to SGEs, or should the measure be broader than SGEs, and why?	The original policy announcement was clearly intended to apply to large global MNEs. Please refer to the covering letter for our concerns regarding the need for the measure in the first place.
2	Do you consider this policy should apply to only corporate SGEs, and why?	No - please refer to the discussion in the covering letter.
3	Do you consider the policy should seek to cover both royalties and embedded royalties?	No - please refer to the comments in the question regarding embedded royalties.
4	Do you consider there are practical challenges in identifying embedded royalties, and if so, what are they?	Yes, there are practical challenges with identifying embedded royalties. It is extremely difficult to calculate the portion of a royalty that is an embedded royalty and agree the valuation with both related parties and third parties. There are sufficient existing rules to address arrangements where there is a royalty component embedded in a payment for goods or services.
5	Do you consider the policy should seek to address reduced Australian profits which has resulted due to migrated intangibles and DEMPE functions?	No - there are sufficient existing rules to address any perceived concern here.
6	Do you consider any other payments (not related to intangibles or royalties) should also be covered by this policy?	No - there are sufficient existing rules to address any perceived concern here.
7	Do you consider the policy should apply to both related and unrelated entities?	No - there are sufficient existing rules to address any perceived concern here with regard to related parties and unrelated parties. Also, it is most likely not possible to determine the underlying tax rate the third party will bear to determine if insufficient tax has been paid. A third party is under no obligation to disclose this information and the information is likely to be commercially sensitive.

Q No.	Question	Comments
8	What are your views in relation to the options outlined above?	Pillar 2 is introducing a new minimum tax rate to (GloBE) which most jurisdictions have agreed to implement, including Australia. This should be the standard. Potentially introducing a new minimum tax rate of 24% under a sufficient tax test would make Australia an outlier as the rate well exceeds the universally accepted 15% rate. The existence of a patent box regime in a jurisdiction is not necessarily indicative of insufficient tax being paid in the jurisdiction, particularly if the patent box regime is compliant with BEPS Action 5 or is not being used. A 'low or nominal tax jurisidiction list' is not a workable option. 10% is used for interest hybrids.
9	What are your views on the effectiveness or behavioural impacts of other jurisdictions' measures, particularly if Australia were to adopt any similar design features from these measures in the Australian context?	Measures adopted in other jurisdictions are targeted, narrowly applied and very specific to the particular jurisdiction's tax system (for example the US BEAT and GILTI). Australia could adopt a similar measure to the UK which takes into account low tax rate jurisdictions (generally below 10%), though this is not a 'deduction denial' rule. If it is determined Australia needs a rule, it should be targeted and very narrow in scope. However, as per the discussion in the covering letter, it does not appear any new rule is necessary.
10	What are your views on the compliance or administrative experiences with other jurisdictions' measures, particularly if Australia were to adopt any similar design features from these measures in the Australian context?	There are sufficient existing rules in Australia. Arguably no new rule is needed. A new rule would only increase compliance costs.
	Part 3: Multinational tax transparency	
1	Are there any specific features you would introduce to improve how MNEs publicly report tax information?	A focus should also exist on the mandatory reporting of data by the ATO. We believe that current year accounting profit and losses and other items discussed in the covering letter should be included in the ATO Corporate Tax Transparency reports.
2	How should large MNEs be defined for the purpose of enhanced public reporting of tax information? Would the Significant Global Entity definition be appropriate to use?	It would be sensible to rely on the existing scope of entities required to report for CbC reporting purposes as defined in Subdiv 815-E of the *Income Tax Assessment Act 1997* (Cth), being an SGE that has CbC reporting obligations or General Purpose Financial Statement reporting obligations or both.
3	Would you support an incremental (phased in) approach to mandatory tax transparency reporting for a broader range of entities, starting with large MNEs?	Disclosure should be limited to the entities that are required to report for CbC reporting purposes and should not apply any earlier than income years commencing on/from 1 July 2024 (following the EU's CbC Reporting Directive). However, we note that no announcement by Government has been made to make this mandatory.
4	Should Australia mandate improved tax transparency regime in line with the EU's approach to public CbC reporting? If so, why?	CbC reporting is currently made on a confidential basis to the ATO in line with the OECD standard under BEPS Action 13 which requires confidentiality. We note that EU member states have until 22 June 2023 to implement the EU Directive requiring publication of CbC data. (EU Member States have until June 22, 2023 to transpose the Directive into national law and the rules will apply 12 months after the transposition deadline, i.e. from the commencement date of the first financial year starting on or after June 22, 2024). Given the impending introduction of Pillar 2, we suggest Australia delay introducing a public CbC disclosure requirement until that occurs. Australia could also benefit from the experience of the EU public disclosure which is still nearly two years away.
4a	What sorts of entities (based on revenue or entity structure) should this mandate apply to?	Disclosure should be limited to non transparent entities that are required to report for CbC reporting purposes. Trusts and CCIV should be excluded as they are generally not subject to tax (tax is paid by unitholders).
4b	Please provide details of any compliance costs associated with adopting the EU's approach to public CbC reporting.	This is unknown at this stage but could reasonably be expected to place a medium to high compliance burden on affected companies, at a time when many will be also grappling with BEPS Pillar 1 and 2 changes.
5	If the EU CbC approach was mandated in Australia, are there additional tax disclosures that MNEs should be required to report, such as related party expenses, intangible assets, deferred tax and effective tax rate (ETR) per jurisdiction?	No. Only high-level data should be included in the published CbC Report, being how much tax the MNE pays in the jurisdictions they operate in and the number of employees working in those jurisdictions consistent with information an MNE is required to report in other jurisdictions already (and the Government's announcement). Data such as tax expense, accumulated profits, etc will confuse rather than enlighten, and place an unnecessarily high compliance burden on corporates for limited benefit.
6	Should the GRI tax standard be used as a basis for Australia to mandate MNE public CbC reporting? If so, why?	No - the GRI is a very detailed reporting standard. Australia should look to the EU public reporting standard as a guide for the information to be reported publicly in the event rules are brought in to require public CbC reporting. However, we emphasise that the data required to be reported should be high-level data only.
6a	What sorts of entities (based on revenue or entity structure) should this mandate apply to?	Transparent entities such as Trusts, CCIV should be excluded as generally not subject to tax (tax is paid by unitholders).
6b	Please provide details of any compliance costs associated with adopting the GRI tax standard approach to public CbC reporting.	GRI implementation includes not only the tax component but the suite of other reporting requirements. Taxpayers should be given the option to disclose more than the minimum EU standard, should they have adopted the GRI standard and have sufficient resources at their disposal. Any adoption of the GRI tax standard is expected to place a very high compliance burden on affected companies. We have received feedback that only a select few member companies currently report under the GRI tax standard, and of those that do, had an enormous amount of work to bridge the gap from existing longstanding transparency processes. The time and resources required to comply with the GRI standard should not be
7	If the GRI standard was used as a basis for mandating CbC reporting in Australia, are there additional tax disclosures that MNEs should be required to report, such as related party expenses, intangible assets, deferred tax and effective tax rate (ETR) per jurisdiction?	High-level data only should be included in the published CbC Report, being how much tax the MNE pays in the jurisdictions they operate in and the number of employees working in those jurisdictions consistent with information an MNE is required to report in other jurisdictions already. Other information could be provided at the discretion of the taxpayer, rather than as a mandatory standard, depending on where taxpayers might be in their transparency journey.
8	Would legislating the Tax Transparency Code to include CbC reporting provide a suitable basis for a mandatory transparency reporting framework? If so, why?	No Government announcement has been made to legislate the VTTC. Our understanding is that in the Board of Taxation's 2019 post-implementation review, it considered the VTTC should not be legislated. The CTA supports this, and recommends that any proposed change to this is put forward to the Board for review. We consider that any mandatory CbC reporting requirement should be legislated separately. Please refer to the comments in the covering letter for further views on the VTTC.
8a	What sorts of entities (based on revenue or entity structure) should this mandate apply to?	No comments
8b	Please provide details of any compliance costs associated with adopting the Tax Transparency Code for public CbC reporting.	This is unknown at this stage but could reasonably be expected to place a medium to high compliance burden on affected companies, at a time when many will be also grappling with BEPS Pillar 1 and 2 changes.

Q No.	Question	Comments
9	If the Tax Transparency Code was used as a basis for mandating CbC reporting in Australia, are there additional tax disclosures that MNEs should be required to report, such as related party expenses, intangible assets, deferred tax and effective tax rate (ETR) per jurisdiction?	High-level data only should be included in the published CbC Report, being how much tax the MNE pays in the jurisdictions they operate in and the number of employees working in those jurisdictions consistent with information an MNE is required to report in other jurisdictions already.
10	How should entities be required to publicly report their CbC information? Would publication in their annual report be adequate? Should this CbC data be verifiable (via independent audit, certification letter from CFO, reconcilable with financial accounts etc)?	An MNE publishing this data would likely follow an internal standard of approval (eg an 'agreed upon procedure') before publishing any CbC information. No further audit or verification should be necessary.
11	What role should Government play in reviewing, publishing and aggregated analysis of country-by-country data?	The ATO should collate and publish the data list consistent with how they publish VTTC data already.
12	What is the most appropriate way to ensure consistent (standard) reporting by MNEs of their public CbC information?	Requirements should be set regarding the information required to be published to ensure all entities report consistent information. This should allow for both numerical data and an accompanying narrative that explains the data. This should all be captured in any government report that collates and publishes the data.
13	Should the data be reported in a standardised template? What should this be?	As per above, requirements should be set regarding the information required to be published to ensure all entities report consistent information and that allows both numerical information and an accompanying narrative that explains the data.
14	When should mandatory tax transparency reports fall due? For example, should they occur at the same time as annual reports are produced, tax returns lodged, or be staggered to spread compliance burdens?	The report should not be required any earlier than 12 months following the MNE's year-end data. For example, if the MNE has a year-end of 31 December, any mandatory tax transparency reports should fall due by 31 December the following year. This is in-line with the 12 month due date for many MNE's CbCRs as well as the EU's CbC Reporting Directive.
15	Are there any transitional arrangements that would need to be considered prior to commencement of a legislated reporting requirement? What would these be?	Yes, we believe the implementation of any mandatory reporting should not commence until after the implementation of Pillars 1 and 2. Any measure should not apply any earlier than income years commencing on/from 1 July 2024 (following the EU's CbC Reporting Directive).
	Mandatory reporting of material tax risk to shareholders	
16	How should entities disclose to shareholders whether they have a material tax risk?	No definition of the concept of 'material tax risk' is provided so it is unclear what disclosures are being required. The Australian Accounting Standards and their international counterparts set out the required tax disclosures in a company's financial statements in relation to uncertain tax positions and tax risks. ASX continuous disclosure requires listed companies to disclose once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information. Disclosure of tax risks should be under the requisite accounting standards only. Tax risk is no different to other risks that an enterprise must manage, and should have the same disclosure requirements. It would be useful to understand what additional tax risks outside that in published accounts are sought to be disclosed.
17	What would be an appropriate channel for entities to disclose if they are doing business in a low-tax jurisdiction?	The new Pillar 2 minimum tax rules will be coming into effect in the near future. It would useful to understand the impact of those rules on tax disclosures before considering the need for mandatory reporting rules.
17a	Are disclosures of this nature already released by organisations?	There are disclosures already made by organisations doing business in low-tax jurisdicstions. However, there is no universally accepted definition of a low-tax jurisdiction for this purpose.
17b	Could existing mechanisms be utilised for disclosures of this nature?	See above
18	What types of high-risk tax arrangements should be disclosed to shareholders? Alternatively, are the existing definitions or PCG guidance that should be used to declare higher tax risk arrangements?	A PCG is an ATO risk assessment tool, not law, indicating where the ATO will devote its resources. They are not limited to dealings with entities in tax havens. They are not an appropriate tool for this purpose.
19	Should a threshold apply to entities mandatorily reporting tax haven exposure to shareholders? If so, what would be an appropriate threshold and why?	Reliance should be placed on the Australian Accounting Standards and their international counterpart already in place.
20	What due diligence should companies undertake to ensure the disclosure is accurate?	Reliance should be placed on the Australian Accounting Standards and their international counterpart already in place.
	Requiring government tenderers to disclose their country of tax domicile	
21	In considering a disclosure requirement, should the entity's tax residency status be used as the definition of 'tax domicile'?	Yes
22	Are there any unintended consequences that may arise from this new information requirement? If yes, what are they?	Not that we are aware of.
23	How should this commitment be implemented?	No comment
24	Should entities disclosing this information be subject to any verification process, having regard for compliance costs (for both taxpayers and government)?	No. Penalty regimes for full and true disclosure should be sufficient to ensure the policy intent is met.
25	Are there any general compliance cost considerations the Government should take into account in requiring Government tenderers to disclose their country of tax domicile?	Not that we are aware of.